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Supreme Court of the United States

OCTOBER, 1942, TERM.

No. 838.

LYMAN FLENIKEN AND MRS. LYMAN FLENIKEN, PETITIONERS,

VS.

GREAT AMERICAN INDEMNITY COMPANY, A CORPORATION, CAPITAL CITY PRESS, A CORPORATION, WM. WOLF BAKERY, INC., A CORPORATION, AND HARRY V. BOOTH, RECEIVER OF UNITED EMPLOYERS CASUALTY COMPANY, A CORPORATION, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion and judgment of the Court below are found in the Transcript of Record, pages 268-276, inclusive.

PROVISIONS OF FEDERAL CONSTITUTION, FEDERAL STATUTES AND OF LOUISIANA REVISED CIVIL CODE INVOLVED.

The following provisions of the Constitution of the United States, of the statutes of the United States and of the Louisiana Revised Civil Code are involved in this application:

Seventh Amendment to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

Section 34 of the Judiciary Act of September 24, 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A., Sec. 725:

> "Sec. 725. Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Sections 2317 and 2320 of the Louisiana Revised Civil Code:

> "2317. (2296) (N 1382). Liability as *Respondeat Superior*—Things in Custody.—We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."
>
> "2320. (2299) (N 1384). Masters, Teachers and Artisans—Liability.—Masters and employers are answerable for the damage occasioned by their

servants and overseers, in the exercise of the functions in which they are employed. Teachers and Artisans are answerable for the damage caused by the scholars or apprentices while under their superintendence. In the above cases responsibility only attaches when the masters or employers, teachers and artisans might have prevented the act which caused the damage and have not done it."

SUMMARY STATEMENT MATTERS INVOLVED.

Your petitioner Lyman Fleniken and Mrs. Lyman Fleniken, citizens of Louisiana, show unto the Court the following facts, to-wit:

First: Your petitioners, in 1940, filed this suit for damages arising out of personal injuries in the United States District Court for the Eastern District of Louisiana against the Great American Indemnity Company, a New York insurance corporation (R. 6). The basis of the jurisdiction of the District Court was diversity of citizenship (R. 6, 10). The Great American Indemnity Company was sued as insurer of the Capital City Press (R. 9), a Louisiana corporation engaged in publishing and distributing two newspapers in Baton Rouge and vicinity, under a provision of the Louisiana Statutes authorizing direct action against the insurer (Act 55 of 1930). Under third party practice the Wm. Wolf Bakery, Inc., its insurer, United Employers Casualty Company, and the Capital City Press were made defendants (R. 25).

Second: Your petitioners seek damages for serious personal injuries sustained when a motorcycle on which they were riding was struck by an automobile owned by one Ewell and driven by one Neyland who was at the time delivering papers published by the Capital City Press to subscribers. Petitioners claim that Neyland who was driving for Ewell, a regular route carrier (with the knowledge and consent of the Capital City Press), was an em-

ployee of the Capital City Press which, with its insurer, would be liable for the acts of Ewell and Neyland, the carriers (R. 8).

Third: The cause was tried to a jury before Honorable Adrian J. Caillouet, District Judge (R. 82, 83). On motion the District Court directed a verdict for the respondents Wm. Wolf Bakery, Inc., and its insurer, United Employers Casualty Company, appearing through its Receiver Booth (R. 242, 243). A verdict was directed for the Capital City Press on procedural grounds (R. 243).

The jury returned a verdict for petitioner Lyman Fleniken in the sum of $20,454, and for petitioner Mrs. Lyman Fleniken in the sum of $2,000 (R. 243). Motion for new trial was denied by the District Court except for excessiveness of verdict, to cure which the petitioners under order of Court filed a joint remittitur resulting in judgment for petitioners against respondent, Great American Indemnity Company, as follows: For petitioner Lyman Fleniken, $14,698; for petitioner Mrs. Lyman Fleniken, $600 (R. 247-251).

Fourth: Briefly, with respect to the relationship between the Capital City Press (hereinafter referred to as "The Press") and Ewell and Neyland, the evidence was as follows: At the time of the accident Neyland was delivering papers of the Press on Ewell's regular route, as substitute carrier for Ewell (R. 117), with the knowledge and consent of the Press (R. 119-120). The Press advertised that carrier delivery was available to its subscribers (R. 104). Ewell and Neyland were operating under oral agreement with the Press (R. 94, 177), Papers were delivered daily by Ewell or Neyland to about 275 subscribers (R. 200) over a route about 150 miles long (R. 179), and were placed by them in delivery boxes which had been furnished by the Press (R. 98). The Press publishes two daily newspapers in the city of Baton Rouge (R. 121), both of which had been delivered over a certain specified route (R. 93) by Ewell since 1936 (R. 177) un-

til the time of the accident in May, 1940, and thereafter (R. 117-118). Ewell and other motor carriers were "under the jurisdiction of the circulation Manager of the Press (R. 92). The Press, desiring increased and wide circulation (R. 94), and feeling that it owed its advertisers the duty of covering the territory served by its motor carriers in the vicinity of Baton Rouge (R. 189-190), paid to the carriers the equivalent of a "car allowance" depending, in part, on the number of miles on the carriers' daily route (R. 98, 189). The carrier Ewell furnished his own car to carry the papers (R. 178-179). He was supplied the papers by the Press to deliver to subscribers from some of whom he collected, keeping the money he collected (R. 188-189, 217, 218); he was given free papers until the cost of the papers furnished monthly should equal the car allowance (R. 217, 218) (which it never did) (R. 188). Some subscribers subscribed and made payment for papers delivered by carrier, by direct dealings with the Press (R. 108). The Press reserved the right to terminate the arrangement and procure another carrier for the route if deliveries were not made in a satisfactory manner (R. 95-97, 126). The President of the Press Corporation testified that a "rather loose supervision" over the motor carriers was retained and exercised (R. 125-126.) The time, place and manner of delivery of papers were thereby subject to control by the Press. At the time of the accident the Press advertised in its papers that "Subscribers failing to get their papers readily will please notify circulation department over telephone 6121" (R. 104, 106). The Press kept a truck and salaried employes on duty at its plant to deliver papers to any subscriber on the route who failed to receive his paper and notified the circulation department by telephone (R. 103, 105). The Press paid no social security tax on the compensation paid to the carriers (R. 183). At the time of the accident, the carrier Ewell was buying bread from the respondent Wm. Wolf Bakery, Inc., and selling it, on his own account, to customers along the route (R.

200). He also handled dry cleaning on his own account (R. 204). The Press did not object to these activities, but if they should interfere with proper delivery of the papers, or if Ewell started handling anything "that made our papers secondary," the route would be taken from him by the Press (R. 192-193). In the policy of insurance issued by the respondent Great American Indemnity Company to the Press, Ewell, the carrier, was listed in the policy schedule as a "class one employee" along with other carriers and the chief officers of the Press Corporation (R. 72, 81).

Fifth: The cause was appealed to the Circuit Court of Appeals for the Fifth Circuit by the respondent insurer, Great American Indemnity Company (R. 252), which asserted on appeal that: (1) the petitioners failed to make a submissible jury case of employer-employee relationship; and, alternatively, (2) Neyland was also the employee of respondent Wm. Wolf Bakery, Inc., which with its insurer was jointly responsible for his acts (R. 257-258).

The Circuit Court of Appeals, speaking through Hutcheson, J., reversed the judgment of the District Court holding that the motion of the respondent, Great American Indemnity Company, for a directed verdict, should have been sustained, and holding that, as a matter of law, neither Neyland nor Ewell was a servant of the Press for whose actions it was liable, but that Ewell was an independent contractor in the operation of the route (R. 268-275). The judgment of the Circuit Court of Appeals reversed and remanded the cause for further proceedings not inconsistent with its opinion and taxed all costs of the appeal against the petitioners (R. 276). These costs were, in great part, due to the third party complaints filed by respondents Great American Indemnity Company and Wm. Wolf Bakery, Inc.

In its opinion, the Circuit Court of Appeals held (speaking of the motor carrier) that "if, on the other hand,

he was engaged merely, as the undisputed facts show here he was, to get something done which the person employing him wanted done, and the means of performing the work were left to him with no control over physical details as to the manner of performance, whether he is called agent or independent contractor, the person so contracting with him would not be liable for injuries growing out of the use of such means" (R. 275).

The petitioners had relied upon the two most recen Louisiana cases dealing with the liability of newspaper publishers for torts committed by their motor carriers while delivering papers. These cases were *Ravare* v. *McCormick,* (La. App. 1936), 166 So. 183, and *Gallaher* v. *Ricketts,* (La. App., 1939) 187 So. 351, reversed on Rehearing on other grounds, 191 So. 713, cert. granted Louisiana Supreme Court (See Appendix page 25). Writ vacated by stipulation of compromise February 5, 1940 (See Appendix page 26).

The Circuit Court of Appeals cited in support of its judgment only three Louisiana cases, but one of which dealt with the liability of newspaper publishers for torts of others [*Abate* v. *Hirdes,* (La. App., 1929) 121 So. 775, which was decided seven years earlier than the *Ravare case, supra*]. The Circuit Court of Appeals refused to apply the rule of the Louisiana cases relied upon by petitioners, stating (in speaking of the general rule with respect to independent contractors, as the "settled Louisiana rule") that:

> "The Louisiana Court of Appeals cases upon which appellees rely are not in conflict with the settled Louisiana rule. The facts completely distinguish them from the case at bar" (R. 275).

To justify the conclusion reached, the Circuit Court of Appeals cited many cases from jurisdictions other than Louisiana and some general statements of the American Law Institute's Restatement of the Law of Agency, and

directed the reader (R. 273-274) to "see the long list of cases cited in the *Denke case, supra*" (The Denke case being a Texas case which involved an insurance agent). These cases from foreign jurisdictions were distributed as follows:

Texas: three cases;
Michigan: one case;
Kentucky: one case;
Missouri: two cases;
California: one case;
Wyoming: one case.

Of these nine outstate cases, only five of them dealt with the liability of newspaper publishers for torts of its carriers.

The Circuit Court of Appeals, referred to and relied on Arts. 2317 and 2320, La. Rev. Civ. Code (R. 275). Petitioners submitted without avail that the construction and effect given these articles of the Civil Code by the Circuit Court of Appeals had been expressly denied in the jurisprudence of Louisiana, in the case of *Ragas* v. *Douglas*, (La. Sup., 1916) 139 La. 773, 72 So. 242, and in other cases.

Sixth: Petitioners instituted this proceeding to secure a review and reversal of the judgment of the Circuit Court of Appeals and to establish that the Circuit Court of Appeals has decided important questions of local Louisiana law in a manner which conflicts with the applicable local and Federal decisions, has deprived the petitioners of their right to jury trial guaranteed by the Seventh Amendment to the Constitution of the United States, and has wrongfully disregarded a jury finding upon an issue of fact when such finding was supported by competent evidence.

JURISDICTIONAL STATEMENT.

1. The jurisdiction of this Court is invoked pursuant to Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, 43 Stat. 938; U. S. C. A., Title 28, Sec. 344.

2. The date of the original judgment of the Circuit Court of Appeals sought to be reversed is February 1, 1943 (R. 276); petition for rehearing was filed February 20, 1943, within the time prescribed by the Rules of the Fifth Circuit Court of Appeals (R. 277); the petition for rehearing was denied without opinion March 12th, 1943 (R. 320); motion to stay the mandate was filed March 17, 1943 (R. 320); on March 17, 1943, the issuance of the mandate was ordered stayed for thirty days from said date, which is the date of the entry of the last order in the Circuit Court of Appeals for the Fifth Circuit (R. 322).

3. Petitioners invoke the jurisdiction of this Court on these grounds: (a) That in construing Articles 2317 and 2320, La. Rev. Civ. Code, so as to permit recovery against a newspaper publisher for the torts of its carrier only when the publisher might have prevented but did not prevent the act, the Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in a way which conflicts with the applicable local decisions, conflicts with applicable decisions of this Court, and conflicts with Section 34 of the Judiciary Act of (September 24) 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A., Sec. 725; (b) That in failing to follow the most recent decisions of the Louisiana Courts of Appeals on the subject of the liability of a newspaper publisher for the torts of its carrier, the Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in a way which conflicts with the applicable local decisions, and conflicts with Section 34 of the Judiciary Act of (September 24) 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A.,

Sec. 725; (c) That in failing to follow the most recent decisions of the Louisiana Courts of Appeals on the liability of a newspaper publisher for the torts of its carrier, the Fifth Circuit Court of Appeals has rendered a decision conflicting with the decisions of this Court and with the decisions of the Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeals which hold that, where coordinate decisions of state courts are conflicting, the Federal Courts are bound to accept the latest decision as determining the state law; (d) That the opinion of the Fifth Circuit Court of Appeals in the case at bar conflicts with a decision of the Tenth Circuit Court of Appeals; (e) That in finding against the petitioners in whose favor a jury verdict has been rendered in the District Court, the Circuit Court of Appeals deprived your petitioners of the right to trial by jury as guaranteed to them by the Seventh Amendment to the Constitution of the United States, thereby deciding a federal question in a way which conflicts with the Constitution of the United States and with the applicable decisions of this Court holding that no finding of fact made by a jury in a law case upon substantial evidence can be re-examined by the Judge or Judges of a Federal Court.

QUESTIONS PRESENTED.

The following questions are presented in the case at bar, in which the local jurisprudence was applicable since jurisdiction of the District Court rested on diversity of citizenship:

1. In formulating and applying its own construction of Arts. 2317 and 2320, La. Rev. Civ. Code, without regard to the settled jurisprudence of Louisiana (which holds that the apparent limitation of the tort liability of an employer which is suggested by said Articles does not exist at all), did the Fifth Circuit Court of Appeals err

in determining, for itself, that by virtue of the said Articles a limitation on liability of an employer did exist?

2. In failing to follow the most recent decisions of the Louisiana Courts of Appeals dealing with the liability of corporate newspaper publishers for the torts of their carriers [*Ravare* v. *McCormick & Co.*, (La. App., 1936) 166 So. 183, and *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351, reversed on rehearing (La. App., 1939) 191 So. 713, cert. granted by the Louisiana Supreme Court (Appendix page 25), certiorari vacated by stipulation of compromise (Appendix page 26)], and in holding the evidence insufficient for the jury did the Fifth Circuit Court of Appeals decide an important question of local law in a way which probably conflicts with the Jurisprudence of Louisiana contrary to Section 34 of the Judiciary Act of 1789.

3. In failing to follow and apply the most recent Louisiana Courts of Appeals decisions on the identical question involved (namely, the liability of a corporate newspaper publisher for torts of its carrier), and in applying general law deduced from general statements in Louisiana cases involving different fact situations and supported by cases from foreign jurisdictions and common law text references, did the Fifth Circuit Court of Appeals fail to ascertain and apply the applicable state law in violation of the doctrine announced by this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, *West* v. *American Telephone and Telegraph Company*, 311 U. S. 223, *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, and other decisions of this Court?

4. Where there are decisions of the Courts of Appeals of Louisiana on the identical factual and legal issues involved, may the United States Circuit Court of Appeals disregard these decisions and decide the case on the basis of general statements of general law deduced by it from an earlier case of the Louisiana Supreme Court

which involved an entirely different factual issue, and by so doing arrive at a conclusion contrary to that announced by the Louisiana Courts of Appeals?

5. In failing to follow the most recent decisions of the Louisiana Courts of Appeals (dealing with the liability of corporate newspaper publishers for torts of their carriers) did the Fifth Circuit Court of Appeals fail to ascertain and apply the existing local law and in this respect render a decision in conflict with decisions of the Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeals holding that the Federal Courts *must* accept the most recent state court decisions as establishing the local state law?

6. In refusing to hold that the listing in the insurance policy schedule of the alleged servant as a "class 1 employee" made a jury case under the circumstances, did the Fifth Circuit Court of Appeals err and render a decision in conflict with the decision of the Tenth Circuit Court of Appeals in *Ryan-Richards, Inc.*, v. *Whitesides*, (1938) 96 F. 2d 826?

7. In reversing the judgment of the District Court based on a jury verdict for petitioners did the Fifth Circuit Court of Appeals deny to petitioners the right to trial by jury guaranteed to petitioners by the Seventh Amendment to the Constitution of the United States?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

Your petitioners are deeply aggrieved by the action of the Fifth Circuit Court of Appeals, in reversing the substantial judgments based on jury verdicts in their favor for severe personal injuries. Your petitioners submit that the Circuit Court of Appeals, consisting of judges unversed and untrained in the learning and application of

the Louisiana Civil Code and in the jurisprudence of Louisiana not only substituted their judgment for that of the jury but also rendered a decision contrary to the Louisiana Civil Code and to the applicable jurisprudence of Louisiana; that in so doing, they violated federal rules of law established by the decisions of this Court and of other Circuit Courts of Appeals based upon the statutes and Constitution of the United States. Petitioners request this Court to note that the three circuit court judges who decided his cause are all from states other than Louisiana. Judge Hutcheson, who wrote the opinion, came to the Circuit Court of Appeals from Texas. In the decision of the case at bar, Judge Hutcheson relied heavily upon Texas cases which do not agree with the jurisprudence of Louisiana. Judges Holmes and Sibley who concurred in the judgment are from Mississippi and Georgia, respectively.

District Judge Adrian J. Caillouet of Louisiana, who is versed in the theory and application of the Louisiana Civil Code and in the jurisprudence of Louisiana by training and experience, held that a jury case had been made and rendered the judgment based on Louisiana jurisprudence which was reversed by the Circuit Court of Appeals.

Petitioners feel that there are cogent reasons recognized by the rules and decisions of this Court why this petition for certiorari should be granted and the judgment of the Circuit Court of Appeals reviewed. The reasons relied upon follow:

1. The Circuit Court of Appeals decided an important question of local law involving construction of the Civil Code of Louisiana in a way which probably conflicts with the jurisprudence of Louisiana in this: To justify its judgment, the Circuit Court of Appeals below cited Arts. 2317 and 2320, La. Rev. Civ. Code, reading as follows:

> "2317. (2296) (N. 1382). Liability as *Respondeat Superior*—Things in Custody.—We are responsible not only for the damage occasioned by our own act,

but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."

"2320. (2299) (N 1384). Masters, Teachers and Artisans—Liability.—Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed. Teachers and Artisans are answerable for the damage caused by the scholars or apprentices while under their superintendance. In the above cases responsibility only attaches when the masters or employers, teachers and artisans might have prevented the act which caused the damage and have not done it."

The Circuit Court of Appeals construed Article 2320 to render a master or employer liable under the doctrine of *respondeat superior* only when the master or employer "might have prevented but did not prevent the act which caused the danger." This construction, applying the apparent limitation of the tort liability of a corporate employer, suggested by the last sentence of Article 2320 of the Louisiana Civil Code, quoted above, is directly contrary to the jurisprudence of Louisiana. The Louisiana courts have specifically and unqualifiedly held that this apparent limitation on the liability of the employer suggested by Article 2320 of the Civil Code does not exist at all. *Ragas* v. *Douglas*, (La. Sup., 1916) 139 La. 773, 72 So. 242; *Weaver* v. *W. L. Goulden Logging Co.*, (La. Sup., 1906) 116 La. 468, 40 So. 798.

In the *Ragas case, supra*, the Louisiana Supreme Court ruled directly contrary to the construction given the Code by the Circuit Court of Appeals below, saying, at page 774 of 139 La.:

"It is conceded to be the settled jurisprudence of this court, with respect to corporations and partnerships, that, construing article 2320 of the Civil Code as a whole, the last paragraph, which purports

> to limit the liability of masters and employers (as imposed by the first paragraph) for damages occasioned by their servants and overseers, in the exercise of the functions in which they are employed, to cases in which they 'might have prevented the act which caused the damage, and have not done it,' *does not operate to effect that limitation*" (Italics ours).

In the *Weaver case, supra,* the Supreme Court of Louisiana had previously made the same ruling, saying, at page 473 of 116 La.:

> "It therefore may be said that the restriction on the liability of masters embodied in article 2320 (2299) of the Civil Code *has been construed out of the text,* for the reason that it practically nullifies the liability of the master for the acts of his servants as imposed by the express terms of the same article" (Italics ours).

It is apparent then that the Circuit Court of Appeals below has decided an important question of construction of this Article of the Louisiana Code in a manner which is not only probably in conflict with the jurisprudence of Louisiana but is patently in conflict therewith. Such action of the Circuit Court of Appeals, of course, is a violation of Section 34 of the Judiciary Act of 1789 and the decisions of this Court rendered pursuant thereto. *Moore* v. *Illinois Central Railroad Co.,* (1941) 312 U. S. 630, 85 L. Ed. 1089.

2. The Circuit Court of Appeals below decided an important question of local law in a way which probably conflicts with the applicable jurisprudence of Louisiana in this: The question was whether a corporate newspaper publisher was liable for the torts of a motor carrier delivering its papers on a specified route under an oral agreement terminable at the will of the publisher. The question had never been passed upon by the Supreme Court of Louisiana but had been before the Louisiana Courts of Appeals in 1936 and in 1939 in the cases of *Ravare* v. *McCormick & Co.,* (La. App., 1936) 166 So. 183,

and *Gallaher* v. *Ricketts*, (La. App., 1939), 187 So. 351, reversed on rehearing on other grounds (La. App., 1939), 191 So. 713, certiorari granted Louisiana Supreme Court and vacated by stipulation of compromise (Appendix pages 25-26).

In both the Ravare case and the Gallaher case, the corporate publisher was held to be liable upon facts practically identical to those in the case at bar. The Circuit Court of Appeals below refused to apply the rule of these cases and held the evidence to be insufficient to take the case to the jury. To justify this conclusion the Circuit Court of Appeals cited twelve cases (only three of which were from Louisiana), and a fragment of the text and comment of the Restatement of the Law of Agency. Specifically the Circuit Court of Appeals relied upon a general statement defining the term "independent contractor" found in the Louisiana case of *Robideaux* v. *Hebert*, (1907) 118 La. 1089, 43 So. 887, a case involving the liability of a railroad for the acts of an independent contractor engaged by a railroad in the movement of earth to make a "fill." The above-mentioned Louisiana Courts of Appeals cases on the precise point were disposed of without being named or discussed in the opinion, in two sentences as follows:

> "The Louisiana Court of Appeals cases, on which appellees rely, are not in conflict with the settled Louisiana rule. Their facts completely distinguish them from the case at bar."

Petitioners submit that in failing to apply the rule of these cases the Circuit Court of Appeals below has decided an important question of local law in a way which probably conflicts with the jurisprudence of Louisiana.

3. The action of the Circuit Court of Appeals below in disregarding the last controlling opinions of the Courts of Appeals of Louisiana, dealing with the tort liability of a corporate newspaper publisher for the acts of

its motor carriers, and in applying general law contrary thereto deduced from general statements in Louisiana cases involving different fact situations, from cases from foreign jurisdictions and from common law text references, constitutes a failure to ascertain and apply the applicable jurisprudence of Louisiana in violation of the decisions of this Court in *Stoner* v. *New York Life Insurance Company*, 311 U. S. 464; *West* v. *American Telephone and Telegraph Co.*, 311 U. S. 223; *Six Companies of California* v. *Joint Highway District No. 13 of California*, 311 U. S. 180; and *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169. These cases require the Federal Courts, in diversity of citizenship cases, to apply the state law as declared by intermediate courts of appeals in the absence of a decision on the point involved by the Supreme Court of the state. The judgment of the Circuit Court of Appeals below is in conflict with the doctrine and rule of law announced by these decisions of this Court.

4. There were decisions of the Courts of Appeals of Louisiana upon the identical factual and legal issues involved in the case at bar (namely, the liability of a corporate newspaper publisher for the torts of its carrier), *Ravare* v. *McCormick & Co.*, (La. App., 1936) 166 So. 183; *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351 reversed on rehearing (La. App., 1939), 191 So. 713, cert. granted by the Louisiana Supreme Court (Appendix page 25), cert. vacated by stipulation of compromise (Appendix page 26). In purporting to determine the jurisprudence of Louisiana, the Circuit Court of Appeals below ignored these applicable decisions and decided the case on the basis of general statements extracted from a case of the Louisiana Supreme Court which dealt with an independent contractor building a fill for a railroad company. *Robideaux* v. *Hebert*, (1907) 118 La. 1089, 43 So. 88, decided 29 years prior to the *Ravare case, supra*, and 32 years prior to the *Gallaher case, supra*.

Petitioners submit that this action of the Circuit Court of Appeals below indicates that it decided an important question of local law in a way which probably conflicts with the jurisprudence of Louisiana and constitutes the decision of an important Federal question in a way which conflicts with the applicable decisions of this Court and with Section 34 of the Judiciary Act of 1789. *West* v. *American Telephone and Telegraph Co.*, 311 U. S. 223; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

In *West* v. *American Telephone and Telegraph Co.*, *supra*, the controlling Federal rule of decision with respect to the force of cases of intermediate appellate courts of a state was stated as follows (311 U. S., l. c. 237):

> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a Federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

The decisions of this Court do not require that the decision of the intermediate state appellate court required to be followed must have been rendered in a controversy between the same parties who are later in the Federal Court. *Six Companies of California* v. *Joint Highway District No. 13 of California*, 311 U. S. 180; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169.

5. The Circuit Court of Appeals below rendered a decision in conflict with decisions of the Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeals in this: The Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeals have held that, in determining the applicable local law, the most recent pronouncement of the state courts *must* be accepted by the Federal Courts as declaring the

law of the state where coordinate decisions of a state's courts are conflicting or are assumed to conflict.

Fourth Circuit:	*Dayton & Michigan R. Co.* v. *Commissioner of Internal Revenue,* (1940) 112 F. 2d 627, l. c. 630;
Seventh Circuit:	*Alexander* v. *Missouri State Life Ins. Co.,* (1933) 68 F. 2d 1, l. c. 3;
Eighth Circuit:	*Yoder* v. *Nu-Enamel Corporation,* (1941) 117 F. 2d 488, l. c. 490;
Ninth Circuit:	*Toole County Irr. Dist.* v. *Moody,* (1942) 125 F. 2d 498, l. c. 501.

In the case at bar the Fifth Circuit Court of Appeals chose to follow its interpretation of an earlier decision of the Louisiana Court of Appeals dealing with the liability of a newspaper publisher for the torts of its carriers. *Abate* v. *Hirdes,* (1929) 9 La. App. 688, 121 So. 775. If the Abate case is assumed to conflict with the later Courts of Appeals cases on the same subject, it is the duty of the Federal Court to follow the later cases. *Ravare* v. *McCormick & Co.,* (La. App., 1936) 166 So. 183, and *Gallaher* v. *Ricketts,* (La. App., 1939) 187 So. 351, reversed on rehearing on other grounds (La. App., 1939) 191 So. 713, cert. granted Louisiana Supreme Court (See Appendix page 25) writ vacated by stipulation of compromise February 5, 1940 (See Appendix page 26).

The evidence in the recorded opinions indicates that the Fifth Circuit Court of Appeals has formulated, and follows, a rule of decision that it need not apply the most recent state court decision. Thus the Fifth Circuit Court of Appeals has previously taken the position that the Federal Courts need not follow the most recent coordinate decision dealing with the problem but may follow whatever decision the Federal Court considers to be a correct

statement of the law. See *Sabine Lumber Co.* v. *Broderick*, (1937) 88 F. 2d 586, l. c. 588. There, in the course of passing upon a case in which conflicting Louisiana decisions had been cited by opposing counsel, it was said:

> "Undoubtedly, expressions in the cases above mentioned tend to support the contentions of the parties citing them. Considering the conflict in the Louisiana jurisprudence, the District Court was entitled to follow the decisions he considered correctly stated the law."

Whether the Federal Courts must follow the most recent pronouncements of coordinate state courts is a federal question of importance upon which the decisions of the Fifth Circuit Court of Appeals conflict with the decisions of the Fourth, Seventh, Eighth and Ninth Circuits.

6. The Circuit Court of Appeals below rendered a decision in conflict with the decision of the Tenth Circuit Court of Appeals in the case of *Ryan-Richards, Inc.*, v. *Whitesides*, (Okla., 1938) 96 F. 2d 826, in this: In the case at bar the motor carrier, for whose acts petitioners sought to hold the publisher and its insurer liable, was listed in the automobile liability insurance policy as a "Class 1 employee" which was defined as follows:

> "Class 1 consists of the following persons provided their usual duties in the business of the named assured include the use of automobiles as described in Par. 1: (a) all employees including officers of the named assured compensated for the use of such automobiles by salary, commission, terms of employment or specific operating allowance of any sort; (b) all direct agents or representatives of the named assured" (R. 80).

The Circuit Court of Appeals below held that the admission embodied in this evidence was not sufficient to take the case to the jury. This is directly contrary to the holding of the Tenth Circuit Court of Appeals in the *Ryan-*

Richards case, supra, where a substantially identical question was presented and the Tenth Circuit Court of Appeals held the evidence sufficient to take the case to the jury, saying (96 F. 2d 826, l. c. 835):

> "In the instant case the 'contractor,' in a written report made to the Highway Commission, sworn to, stated that the 'truck driver' was its employee. This is direct evidence to be considered in connection with all the circumstances. True, the 'contractor' and its codefendant, the 'truck driver,' seek to explain this admission in writing, but that, under the evidence in the record, is a question for the determination by the jury as to independent contractor *vel non.*"

In Louisiana jurisprudence, as in Oklahoma, the word "employee" is understood and used to describe one for whose torts the employer is liable and it excludes one who is an independent contractor for whose torts the other contracting party is not liable. See *Jones* v. *Shehee Ford Wagon and Harness Co., Inc.,* (La. App., 1934) 163 So. 129, l. c. 132, where it is said:

> "The evidence on the subject is conclusive and undisputed that the driver of the Ford car was employed as a salesman for the Shehee-Ford Company, at a regular salary, and not on a commission basis, and that in the rendering of his services he was under the direction and control of his employer, and *was subject to discharge if he did not obey* the directions of his employer. *That means that he was not an independent contractor, but an employee*" (Italics ours).

The Circuit Court of Appeals below disregarded the meaning generally attached to the word "employee" and rendered a decision in the case at bar which is in conflict with the decision of the Tenth Circuit Court of Appeals cited above.

7. In reversing the judgment of the District Court based upon a jury verdict for petitioners, where there was

substantial evidence to support the verdict under the applicable Louisiana jurisprudence, the Fifth Circuit Court of Appeals substituted its judgment upon the fact for the finding of the jury, thereby denying to petitioners the right to trial by jury guaranteed to petitioners by the Seventh Amendment to the Constitution of the United States. *Stoner* v. *New York Life Insurance Co.*, 311 U. S. 464. In the Stoner case this Court in speaking of an analogous situation said (311 U. S. l. c. 468):

> "It is apparent, then, that the question of total disability, on the evidence before the court in those two cases, is a question for the jury under instructions embodying the test, the Kansas City Court of Appeals approved. Under the rule of the *West, Six Companies*, and *Field Cases, supra*, it was error for the Circuit Court of Appeals to hold, in effect, that the evidence would not support the finding of the trial judge that there was total disability, unless convincing evidence indicated that the Missouri Supreme Court would decide differently."

In view of the state of the jurisprudence of Louisiana, petitioners submit that they have been deprived of their constitutional right to trial by jury.

CONCLUSION.

Wherefore, for the reasons stated herein, it is respectfully submitted by petitioners that this case is one calling for the exercise by the Court of its discretionary powers, in order that the errors herein pointed out may be corrected; in order that the law may be properly and authoritatively settled; in order that justice may be done. And to such ends, the petitioners respectfully submit that a writ of certiorari should be granted and that this Court should

review the decision of the Circuit Court of Appeals for the Fifth Circuit and finally reverse it.

Lyman Fleniken,
Mrs. Lyman Fleniken,

By William J. Beck,
Counsel for Petitioners.

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Columbia, Missouri,
Of Counsel for Petitioners.

APPENDIX TO PETITION.

Appendix I.

Order of Supreme Court of Louisiana granting certiorari to review judgment of Louisiana Court of Appeals in *Gallaher* v. *Ricketts*, (La. App. 1939), 187 So. 351 reversed on rehearing (La. App. 1939), 191 So. 713.

No. 35,619

Supreme Court
-of the-
State of Louisiana

Filed November 27, 1939
(Signed): V. J. Courville,
Deputy Clerk.

Miss Laura Gallaher

versus

Mrs. Nathaniel W. Ricketts et al.

In Re Mary Gallaher Applying for *Certiorari*, or writ of review, to the Court of Appeal Parish of Orleans State of Louisiana.

Granted

(Signed): J. R. L.
" W. G. R.
" A. T. H.
" J. B. F.
" A. L. P.

Benjamin Y. Wolf
Attorneys for Applicant.

John May, Spencer, Phelps, Dunbar & Marks and Deutsch and Kerrigan,
Attorneys for Respondents.

A True Copy,

Clerk's Office, New Orleans, March 27, 1943.
Signed Louis P. Niklaus
Clerk.

Appendix II.

Order of Supreme Court of Louisiana vacating on suggestion of compromise, writ of certiorari, to Louisiana Court of Appeals in *Gallaher* v. *Ricketts,* (La. App. 1939), 187 So. 351, reversed on rehearing, (La. App. 1939) 191 So. 713.

No. 36,619

Supreme Court
State of Louisiana

Filed February 5, 1940
(Signed): Louis P. Niklaus
Clerk.

Miss Laura Gallaher

vs.

Mrs. Nathaniel W. Ricketts et al.

On motion of Miss Mary Gallaher, applicant for writ, herein appearing and acting by and through her attorney, Benjamin Y. Wolf, and of Times-Picayune Publishing Company and The Travelers Insurance Company, herein appearing and acting by and through their attorneys, John May and Spencer, Phelps, Dunbar & Marks, and on suggesting to the court that this case has been amicably compromised and settled

It Is Ordered, Adjudged and Decreed that the writ of certiorari and review issued by this court to the Court of Appeal for the Parish of Orleans be and it is hereby vacated, and that this suit, as now before us on writ, be and it is hereby dismissed, all litigants to pay their own costs.

Judgment Read, Rendered and Signed, this 5th day of Feby., 1940.

(signed): Charles A. O'Neill,
Chief Justice

New Orleans, Louisiana
Approved: February 5, 1940
(Signed): Benjamin Y. Wolf
" John May
(Seal)

A True Copy.

Clerk's Office, New Orleans, June 4, 1942
(Signed) V. J. Courville
Deputy Clerk.

(13)

Office - Supreme Court, U. S.
APR 16 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER, 1942, TERM.

No. 938.

LYMAN FLENIKEN AND MRS. LYMAN FLENIKEN, PETITIONERS,

VS.

GREAT AMERICAN INDEMNITY COMPANY, A CORPORATION, CAPITAL CITY PRESS, A CORPORATION, WM. WOLF BAKERY, INC., A CORPORATION, AND HARRY V. BOOTH, RECEIVER OF UNITED EMPLOYERS CASUALTY COMPANY, A CORPORATION, RESPONDENTS.

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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(d) The court below erred in holding that, under the circumstances, the admission, embodied in the listing of the motor carrier in the insurance policy as a "class 1 employee" was not sufficient to take the case to the jury. This holding of the court below conflicts with the decision of the Tenth Circuit Court of Appeals in Ryan-Richards, Inc., vs. Whitesides, (Okla., 1938) 96 F. 2d 826, and with the decision of the Louisiana Court of Appeal in Jones vs. Shehee Ford Wagon and Harness Co., Inc., (1934) 163 So. 129 27

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Supreme Court of the United States

OCTOBER, 1942, TERM.

No. .....

LYMAN FLENIKEN AND MRS. LYMAN FLENIKEN, PETITIONERS,

VS.

GREAT AMERICAN INDEMNITY COMPANY, A CORPORATION, CAPITAL CITY PRESS, A CORPORATION, WM. WOLF BAKERY, INC., A CORPORATION, AND HARRY V. BOOTH, RECEIVER OF UNITED EMPLOYERS CASUALTY COMPANY, A CORPORATION, RESPONDENTS.

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court below has not been published. It is found in the Transcript of Record at pages 268 to 276 inclusive.

II.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

1. The jurisdiction of this Court is invoked pursuant to Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, 43 Stat. 938; U. S. C. A., Tit. 28, Sec. 344.

2. The date of the original judgment of the Circuit Court of Appeals sought to be reversed is February 1, 1943 (R. 276); petition for rehearing was filed February 20, 1943, within the time prescribed by the Rules of the Fifth Circuit Court of Appeals (R. 277); the petition for rehearing was denied without opinion March 12th, 1943 (R. 320); motion to stay the mandate was filed March 17, 1943 (R. 320); on March 17, 1943, the issuance of the mandate was ordered stayed for thirty days from said date, which is the date of the entry of the last order in the Circuit Court of Appeals for the Fifth Circuit (R. 322).

3. Petitioners invoke the jurisdiction of this Court on these grounds: (a) That in construing Art. 2317 and 2320, La. Rev. Civ. Code, so as to permit recovery against a newspaper publisher for the torts of its carrier only when the publisher might have prevented but did not prevent the act, the Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in a way which conflicts with the applicable local decisions, conflicts with applicable decisions of this Court, and conflicts with Section 34 of the Judiciary Act of (September 24) 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A., Sec. 725; (b) That in failing to follow the most recent decisions of the Louisiana Courts of Appeal on the subject of the liability of a newspaper publisher for the torts of its carrier, the Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in a way which conflicts with the applicable local decisions, and conflicts with Section 34 of the Judiciary Act of (September 24) 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A.,

Sec. 725; (c) That in failing to follow the most recent decisions of the Louisiana Courts of Appeal on the liability of a newspaper publisher for the torts of its carrier, the Fifth Circuit Court of Appeals has rendered a decision conflicting with the decisions of this Court and with the decisions of the Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeals which hold that, where coordinate decisions of state courts are conflicting, the Federal Courts are bound to accept the latest decision as determining the state law; (d) That the opinion of the Fifth Circuit Court of Appeals in the case at bar conflicts with a decision of the Tenth Circuit Court of Appeals; (e) That in finding against the petitioners in whose favor a jury verdict has been rendered in the District Court, the Circuit Court of Appeals deprived your petitioners of the right to trial by jury as guaranteed to them by the Seventh Amendment to the Constitution of the United States, thereby deciding a federal question in a way which conflicts with the Constitution of the United States and with the applicable decisions of this Court holding that no finding of fact made by a jury in a law case upon substantial evidence can be reexamined by the Judge or Judges of a Federal Court.

III.

STATEMENT OF THE CASE.

The essential facts of this case are stated in the petition for certiorari under the heading "Summary Statement of Matters Involved" (Petition for Certiorari, pages 3 to 8 inclusive). In the interest of brevity those facts will not be restated here.

IV.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals for the Fifth Circuit, below, committed the following errors:

1. The Court below erred in construing Arts. 2317 and 2320, La. Rev. Civ. Code, to render a master or employer liable under the doctrine of *respondeat superior* only when the master or employer "might have prevented but did not prevent the act which caused the danger." This construction is directly contrary to the controlling jurisprudence of Louisiana. Louisiana jurisprudence unequivocally holds that the last sentence of Article 2320 (which suggests that the liability of employers is limited to cases in which the employers "might have prevented the act which caused the damage and have not done it") does not operate to effect a limitation on the liability of corporate employers. The Circuit Court of Appeals below had no right to construe the Louisiana Code without giving effect to the construction thereof adopted and recognized by the Courts of Louisiana.

2. The Court below erred in holding the evidence in the case at bar insufficient to make a case for the jury. In so doing the Court below decided a question of local law in a way which conflicts with the applicable jurisprudence of Louisiana contrary to Section 34 of the Judiciary Act of 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A., Sec. 725.

3. The Court below erred in failing to ascertain and apply the applicable Louisiana jurisprudence governing the liability of a corporate Louisiana newspaper publisher for the torts of its motor carrier delivering its papers on a specified route under an oral agreement terminable at the will of the publisher. And in this connection the Court below erred in failing to follow the controlling and most recent decisions of the Louisiana Courts of Appeal on the precise point involved. *Ravare* v. *McCormick & Co.*, (La. App., 1936) 166 So. 183; *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351, reversed on rehearing (La. App., 1939), 191 So. 713, cert. granted by Louisiana Supreme Court (Appendix to Petition, page 25), certiorari vacated by stipulation of compromise (Appendix to Peti-

tion, page 26). This action of the Court below violated the doctrine announced by this Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, *West* v. *American Telephone and Telegraph Company,* 311 U. S. 223, *Stoner* v. *New York Life Insurance Co.,* 311 U. S. 464, *Six Companies of California* v. *Joint Highway District No. 13 ~~by~~ of California,* 311 U. S. 180, and in *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, which require the Federal Courts, in diversity of citizenship cases, to apply the state law as declared by the state intermediate Courts of Appeals in the absence of a decision on the point involved by the highest court of the state.

4. The Court below erred in disregarding the decisions of the Louisiana Courts of Appeal upon the identical factual and legal issues involved in the case at bar (the liability of a corporate newspaper publisher for the acts of its motor carrier delivering papers on a prescribed route under a contract terminable at the will of the publisher) and erred in deciding the case on the basis of general law (contrary to the controlling Louisiana Courts of Appeal decisions), deduced from: (1) general statements found in an earlier Louisiana Supreme Court decision dealing with an entirely different fact situation; (2) cases from foreign jurisdictions; and, (3) common law text references. This action constituted a failure to ascertain and apply the applicable local jurisprudence, contrary to Section 34 of the Judiciary Act of 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A., Sec. 725, to *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, to *West* v. *American Telephone and Telegraph Co.,* 311 U. S. 223, and to other decisions of this Court.

5. The Court below erred in rendering a decision contrary to decisions of the Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeals which hold that, in diversity of citizenship cases, the Federal Courts are bound to accept the most recent state court decisions on the subject as establishing the state law. In the case at bar the

Court below chose to rely on its interpretation of an earlier decision of the Louisiana Court of Appeal dealing with the liability of a newspaper publisher, *Abate* v. *Hirdes,* (1929) 9 La. App. 688, 121 So. 775, rather than to rely on the more recent cases of the Louisiana Courts of Appeal precisely in point. *Ravare* v. *McCormick and Co.,* (La. App., 1936) 166 So. 183; *Gallaher* v. *Ricketts,* (La. App., 1939) 187 So. 351, reversed on rehearing on other grounds (La. App.), 191 So. 713, cert. granted by Louisiana Supreme Court (Appendix to Petition, page 25), cert. vacated by stipulation of compromise (Appendix to Petition, page 26).

6. The Court below erred in holding that, under the circumstances, the admission, embodied in the listing of the motor carrier in the insurance policy as a "class 1 employee," was not sufficient to take the case to the jury. This holding of the Court below conflicts with the decision of the Tenth Circuit Court of Appeals in *Ryan-Richards, Inc.,* v. *Whitesides,* (Okla., 1938) 96 F. 2d 826, and with the decision of the Louisiana Court of Appeals in *Jones* v. *Shehee Ford Wagon and Harness Co., Inc.,* (1934) 163 So. 129.

7. The Court below erred in holding that the motion for directed verdict of the respondent Great American Indemnity Company should have been sustained, because: (a) there was sufficient evidence to make a case for the jury under the applicable Louisiana jurisprudence; and, (b) such holding violated the Seventh Amendment to the Constitution of the United States guaranteeing the right to trial by jury in civil cases and forbidding the re-examination in any Court of the United States of any fact tried by a jury.

V.

SUMMARY OF ARGUMENT.

1. The Circuit Court of Appeals below failed to give to Articles 2317 and 2320, La. Rev. Civ. Code, the construction it was bound to give these Articles under the Federal law.

(a) The construction given a Louisiana Code provision by the Courts of Louisiana is binding on the Federal Courts.

(b) The last sentence of Art. 2320, La. Rev. Civ. Code, as construed by the Courts of Louisiana does not operate to effect a limitation on the liability of corporate employers.

(c) The Circuit Court of Appeals below held, contrary to Louisiana jurisprudence, that the last sentence of Art. 2320, La. Rev. Civ. Code, limits the liability of Louisiana corporate employers.

2. The Circuit Court of Appeals below erred in holding the evidence in the case at bar insufficient to make a case for the jury.

(a) Under section 34 of the Judiciary Act of 1789 the Circuit Court of Appeals was bound to follow the applicable jurisprudence of Louisiana.

(b) The decision of the Circuit Court of Appeals in the case at bar is contrary to the applicable jurisprudence of Louisiana.

(c) The decision of the Circuit Court of Appeals below is in conflict with decisions of the Fourth, Seventh, Eighth, and Ninth Circuit Courts of Appeals which hold that, in diversity of citizenship cases, the Federal Courts are bound to accept the most recent state court decisions on the subject as establishing the state law.

(d) The Court below erred in holding that, under the circumstances, the admission, embodied in the listing of the motor carrier in the insurance policy as a "class 1 employee," was not sufficient to take the

case to the jury. This holding of the Court below conflicts with the decision of the Tenth Circuit Court of Appeals in *Ryan-Richards, Inc.*, v. *Whitesides*, (Okla., 1938) 96 F. 2d 826, and with the decision of the Louisiana Court of Appeal in *Jones* v. *Shehee Ford Wagon and Harness Co., Inc.*, (1934) 163 So. 129.

(e) The decision of the Circuit Court of Appeals below holding that, as a matter of law, the respondent insurer was not liable, deprives the petitioners of the right to trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States.

VI.

ARGUMENT.

It is not always easy, in cases involving application of local law by Federal Courts, to demonstrate to this busy Court the failure of the Federal Court below to properly ascertain and apply the local law. Consciously or unconsciously the opinion of the Court below may "by the practice of logomachy" be "so bewordled" that the departure from local principles of law is not readily apparent. If the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, is to have real meaning and force, this Court should exercise its power of superintending control in cases, not only where the lower court expressly refuses to apply the applicable local law, but also in cases where the lower court professes to apply local law but in fact does not.

To be more specific, this Court should protect litigants in diversity of citizenship cases from application of a Judge's personal hunch or intuition instead of the jurisprudence applicable to the case. The author of the opinion below, Judge Hutcheson, in an interesting exposition of his judicial philosophy reveals a tendency to minimize case law as a guide to decision. In Hutcheson, Judgment Intuitive (The Foundation Press, Inc., Chicago, Illinois, 1938) at pages 23 and 24, Judge Hutcheson describes his method of deciding and writing his decision of a case before him as follows:

> "I remember once, in the trial of a patent case, it was contended with great vigor on the one side that the patent evidenced invention of the highest order, and with equal vigor on the other that the device in question was merely a mechanical advance. I announced, almost without any sense of incongruity, that I would take the case under advisement, and after 'having well and exactly seen and surveyed, overlooked, reviewed, read and read over again' all of the briefs, the authorities and the record, would wait a while before deciding, to give my mind a chance to

hunch it out. For I knew if there was the flash of invention in the device my mind would give back an answering flash; while if there was none, my mind would, in a duly cogitative way, find only mechanical advance.

"One of the lawyers, himself a 'huncher,' smiled and said—'Well, Your Honor, I am very grateful to you for having stated from the Bench what I have long believed, but have hesitated to avow, that next to the pure arbitrament of the dice in judicial decisions, the best chance for justice comes through the hunch.' The other lawyer, with a different type of mind, only looked on as though impatient of such foolery.

"But I, proceeding *according to custom*, got my hunch, found invention and infringement, and by the practice of logomachy so bewordled my opinion in support of my hunch that I found myself in the happy situation of having so satisfied the intuitive lawyer by the correctness of the hunch, and the logomachic lawyer by the spell of my logomachy, that both sides accepted the result and the cause was ended" (Italics ours).

The practice of the "hunch" or "intuition" in the decision of cases may be an interesting and fruitful experiment, but it violates Section 34 of the Judiciary Act of 1789 which requires application of the local jurisprudence. Furthermore, the chances for error in formation of the "judgment intuitive" are multiplied when the Judge is a Texas common law lawyer and the law under consideration is the Louisiana Civil Code.

Since, under the Judiciary Act and the decisions of this Court, it is the object, in diversity of citizenship cases, to secure in the Federal Court the same result that would have been secured in a local court, where the case would have been tried except for the fortuitous circumstance of diversity of citizenship, the applicable local jurisprudence should be carefully ascertained and strictly followed. Petitioners submit that this has not been done in the case at bar.

1. The Circuit Court of Appeals below failed to give to Arts. 2317 and 2320, La. Rev. Civ. Code, the construction it was bound to give these Articles under the Federal law.

(a) The construction given a Louisiana Code provision by the Courts of Louisiana is binding on the Federal Courts.

Even before the decision in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, the Federal Courts applied enactments of local legislatures in accordance with the interpretations given to such enactments by the state's highest courts. This rule, under the decisions of this Court, is still in force after the decision in the Erie case. See *Moore* v. *Illinois Central Railroad Company,* 312 U. S. 630, l. c. 634, where it is said (85 L. Ed., at 1092):

> "But even before the decision in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, the federal courts applied state statutes of limitations in accordance with the interpretations given to such statutes by the states' highest courts. As early as 1893, this Court said: 'The construction given to a statute (of limitations) of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications.' It was error for the court below to depart from the Mississippi Supreme Court's interpretation of the state statute of limitations."

We will not extend the argument under this point because we do not believe that it will be challenged.

(b) The last sentence of Art. 2320, La. Rev. Civ. Code, as construed by the Courts of Louisiana does not operate to effect a limitation on the liability of corporate employers.

Arts. ~~2137~~ 2317 and 2320, La. Rev. Civ. Code, are as follows:

> "2317. (2296) (N 1384). Liability as *Respondeat Superior.*—Things in Custody.—We are responsible,

not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."

"2320 (2299) (N 1384). Masters, Teachers and Artisans—Liability.—Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed. Teachers and Artisans are answerable for the damage caused by the scholars or apprentices while under their superintendence. In the above cases responsibility only attaches when the masters or employers, teachers and artisans might have prevented the act which caused the damage and have not done it."

The last sentence of Article 2320 above suggests that the liability of employers is limited to cases wherein the employer is able to prevent the act which caused the damages, and has not done it. Such a construction of this provision of the Civil Code of Louisiana was adopted by the Circuit Court of Appeals below in finding against these petitioners.

The jurisprudence of Louisiana construing these Articles of the Code and construing the last sentence of Article 2320 is squarely contrary to the construction adopted by the Circuit Court of Appeals below. The Supreme Court of Louisiana and the Louisiana Courts of Appeal have made it clear that the last sentence of Article 2320 of the Civil Code does not operate to effect the limitation in the cases of corporate employers. *Ragas* v. *Douglas,* (1916) 139 La. 773, 72 So. 242; *Weaver* v. *W. L. Goulden Logging Co.,* 116 La. 473, 40 So. 798.

In *Ragas* v. *Douglas, supra,* defendant filed an exception of no cause of action based upon the failure of plaintiff to allege that defendant might have prevented the act which caused the damage and did not do so, the act having been committed by defendant's employee. The Court

overruled the exception. The Court made it clear that the apparent limitation in the Article 2320 of the Civil Code would not be enforced. The Supreme Court said:

> "It is conceded to be the settled jurisprudence of this court, with respect to corporations and partnerships, that, construing article 2320 of the Civil Code as a whole, the last paragraph, which purports to limit the liability of masters and employers (as imposed by the first paragraph) for damages occasioned by their servants and overseers, in the exercise of the functions in which they are employed, to cases in which they 'might have prevented the act which caused the damage, and have not done it,' *does not operate to effect that limitation*" (Italics ours).

And, further in the opinion, quoting with approval from *Weaver* v. *W. L. Goulden Logging Co.*, (1906) 116 La. 468, l. c. 473-474, 40 So. 798, the Court said:

> "It therefore may be said that the restriction on the liability of masters embodied in article 2320 (2299) of the Civil Code *has been construed out of the text*, for the reason that it practically nullifies the liability of the master for the acts of his servants as imposed by the express terms of the same article."

From these cases it appears clear that Article 2320, as applied and construed by the courts of Louisiana, is not subject to the construction and effect given that Article by the Circuit Court of Appeals below in reversing the judgment in favor of the petitioners.

(c) The Circuit Court of Appeals below held, contrary to Louisiana jurisprudence, that the last sentence of Art. 2320, La. Rev. Civ. Code, limits the liability of Louisiana corporate employers.

It seems clear from the opinion of the Court below that the Court below relied upon its erroneous construction of Articles 2317 and 2320, La. Rev. Civ. Code, in setting aside the judgment of the District Court based upon a jury verdict. This appears not only from the citation of Articles 2317 and 2320 to sustain the judgment of the Court but also from the incorporation in the opinion it-

self of language paraphrasing the last sentence of Article 2320 as follows (R. 275);

> "If the relationship of master and servant existed and Ewell was driving the company's automobile, or his automobile, under an arrangement which constituted a hiring of himself and his automobile to the company as its servant, so that the company would or could control the means to be employed in, and the manner of doing, the work, *and therefore might have prevented but did not prevent the act which caused the danger, the doctrine of respondeat superior would apply*" (Italics ours).

Therefore, from the language of the opinion of the Court below it appears that the judgment of the Court below is based upon its erroneous and incorrect construction of Articles 2317 and 2320 contrary to the jurisprudence of Louisiana as announced by the highest court of the state.

2. The Circuit Court of Appeals below erred in holding the evidence in the case at bar insufficient to make a case for the jury.

(a) Under Section 34 of the Judiciary Act of 1789, the Circuit Court of Appeals was bound to follow the applicable jurisprudence of Louisiana.

The jurisdiction of the District Court in this case rested solely upon diversity of citizenship. Only because the respondent insurer, Great American Indemnity Company, was a corporation domiciled in New York was the action instituted in Federal Court. The rights and liability of the parties in state and federal courts should be measured by the law of Louisiana, the state in which the casualty involved occurred and the state of residence of the claimants and the tort feasors. Under these circumstances, whether the legal responsibility of the parties is measured by Louisiana Code provisions or by local judicial decisions, or both, the Federal Courts, hearing the cause, were bound to follow the applicable law, or juris-

prudence, of Louisiana. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *West* v. *American Telephone and Telegraph Company,* 311 U. S. 223; *Moore* v. *Illinois C. R. Co.,* 312 U. S. 630.

(b) The decision of the Circuit Court of Appeals in the case at bar is contrary to the applicable jurisprudence of Louisiana.

This case involved the liability, under the jurisprudence of Louisiana, of a corporate Louisiana newspaper publisher under the doctrine of *respondeat superior* for the torts of a motor carrier delivering the publisher's newspapers daily over a prescribed route under an oral agreement terminable at the will of the publisher. There were controlling decisions of the Louisiana Courts of Appeal dealing with such liability in cases involving practically identical fact situations. *Ravare* v. *McCormack & Co.,* (La. App., 1936), 166 So. 183; *Gallaher* v. *Ricketts,* (La. App., 1939), 187 So. 351, reversed on rehearing (La. App., 1939), 191 So. 713, cert. granted by the Louisiana Supreme Court (Appendix, page 25), certiorari vacated by stipulation of compromise (Appendix, page 26).

There was no decision of the Louisiana Supreme Court dealing with a substantially identical factual and legal situation. If the case had been tried in the courts of Louisiana (where it would have been tried except for diversity of citizenship), the decisions in the Ravare case and the Gallaher case would have been applied and followed.

THE RAVARE CASE.

In the Ravare case (decided in 1936 by the Louisiana Court of Appeal for the Second Circuit), the newspaper publisher, McCormick and Company, was sued under the doctrine of *respondeat superior* for personal injuries sustained by the plaintiffs Louis and Stella Ravare, for the negligence of its carrier Lacombe while engaged in delivering a daily newspaper published by the defendant McCormick and Company. The defendant publishing com-

pany defended on the ground that the carrier Lacombe was not the agent and employee of the publishing company but an independent contractor. It was the job of the carrier Lacombe to deliver the company's publication over a specific hundred mile route and through three towns. "The very nature of the employment involved here made it impracticable and impossible for the company to control or supervise the carrier's acts after he left the company's quarters" (166 So. l. c. 186). The publishing company kept a record listing the customers and agents on Lacombe's route. Customers could make arrangements for delivery of the paper either through Lacombe, the carrier, or through the company. Checks for subscriptions were receivable by Lacombe or by the company, and cash likewise. Lacombe worked on a commission basis and was paid, in addition to his commission, a weekly allowance of about $10 which he used to pay his expenses and from which he could get his commission. Lacombe, the carrier, did not get enough out of his route in commissions to justify his time and expenses. Lacombe was expected to gain circulation, and deliver his papers within a reasonable time. Customer subscribers could look to the publishing company for delivery of their papers. The circulation manager could cancel the agreement with Lacombe, the carrier, and put a new man on the route if it chose to do so. The evidence was conflicting on the issue of whether the automobile used by the carrier, Lacombe, was owned by Lacombe or the publishing company.

Upon this state of facts, which is practically identical with that of the case at bar, the Court of Appeal of Louisiana for the Second Circuit held that the corporate newspaper publisher was responsible for the torts of its carrier committed while delivering its papers over the prescribed route. The defense that the carrier was an independent carrier contractor was expressly considered and denied. The conclusion of the Circuit Court of Appeals below, in the case at bar, is directly in conflict with the decision of the Ravare case.

THE GALLAHER CASE.

The case of *Gallaher* v. *Ricketts,* 187 So. 351, reversed on rehearing 191 So. 713, is in point. The Orleans Court of Appeal, in 1939, in 187 So. 351, awarded damages against the Times-Picayune Publishing Company for injuries suffered by the plaintiff when struck by an automobile driven by one Ricketts. The publishing company contended that Ricketts was an independent contractor. Coleman, the circulation manager, testified that Ricketts was employed under a written contract. Ricketts was a route carrier of newspapers, not employed for any specific length of time. He received no regular salary, and paid for the papers delivered to him, his compensation being in the form of a commission of 40c on every $1 worth of papers disposed of. He used his own automobile in making deliveries, and was paid a fixed allowance of $5 a week for his car expenses. Defendant contended it did not care whether Ricketts delivered papers on foot, by car, or in a push cart, although he could not have covered the route assigned to him unless he used a car. The carrier Ricketts was not employed for any specific length of time and the publisher could at its pleasure dispense with his services and put another carrier on the route. It was contended by the publisher in the Gallaher case, as here, that the carrier was an independent contractor. The Orleans Court of Appeal rejected the contention that the carrier was an independent contractor and held the publishing company liable in damages for the tort of the carrier. Judge Janvier dissented from this holding.

Thereafter, the Orleans Court of Appeal granted a rehearing and on rehearing, annulled its original decree and found that the publishing company was not liable because Ricketts was not at the time of the accident acting within the scope of his employment. See 191 So. 713. The Court, with Judge Janvier as its organ, did not depart from the principles enunciated in its original opinion, but

considered for the first time the proposition that Ricketts was not delivering papers when the accident happened, but was on his way to attend a "pep" meeting. The court held that he was not required or expected to use a car for that purpose, and therefore the publishing company was not responsible for the damage he did in so using his car. This expression is found in this second opinion (191 So. at 716):

> "We think that it may be said that there were two parts to the work which Ricketts was employed to perform. The first and most important was the delivery of papers. In this part of his work defendant was interested in having him use his automobile. It paid a part of the expense of operation and made itself liable for any negligence of which he might be guilty while so delivering papers. * * *"

The Court then said Ricketts' second duty was to attend "pep" meetings, which did not require the use of a car, and that so far as the defendant publishing company was concerned, the automobile was identified solely with the delivery of its newspapers.

So the last published expression of a Louisiana appellate court in that case was strongly in favor of plaintiff's position in the instant case. But the Gallaher case did not end there. On application of the plaintiff a writ of certiorari was unanimously granted by the Supreme Court of Louisiana (Appendix to Petition, page 25). No further published account of the case appears. But in the records of the Office of the Clerk of the Supreme Court of Louisiana, in the matter entitled *"Miss Laura Gallaher* v. *Mrs. Nathaniel W. Ricketts et al.,"* No. 35619 on the docket of the said Supreme Court, is found an order vacating the writ of certiorari issued by the Supreme Court, on the ground that the matter had been compromised and settled. The order was signed and filed February 5, 1940, and it shows that the writ was granted on application of the plaintiff (Appendix to Petition, page 26).

We submit that by granting a writ on plaintiff's application in that case, the Supreme Court of Louisiana certainly indicated that it doubted the correctness of the final holding of the Orleans Court of Appeal which released the publishing company, from liability, even though Ricketts was not delivering papers at the time of the accident. The fact that the writ was granted on plaintiff's application shows that the Supreme Court must have felt that the publishing company should be held liable for Ricketts' act while going to a "pep" meeting, as well as while delivering papers.

The holding of the Circuit Court of Appeals below, in the case at bar, is directly in conflict with the jurisprudence of Louisiana as exemplified by the Gallaher case.

These most recent and controlling decisions of the Louisiana Courts of Appeal in the Ravare case and Gallaher case were not even cited in the opinion of the Court below.

It is one thing for a Circuit Court of Appeals to announce boldly that it will not follow the applicable local case law; that is a matter which can be readily seen and corrected by this Court under the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. It is quite another thing for a Circuit Court of Appeals to state that it is ascertaining and applying local law—apparently buttressing its opinion with citations of two misconstrued articles of the Civil Code, three local cases, nine foreign cases and two sections of the American Law Institute's Restatement of the Law of Agency—when, in fact, it blandly refuses to follow, or even cite, the only applicable local case law dealing with either the meaning of the Articles of the Civil Code of Louisiana in question, or the tort liability of corporate employers upon facts practically identical with the case at bar; that is a matter which can be detected only by determining whether or not the Circuit Court of Appeals correctly ascertained and applied the local law.

If the principles announced by this Court in *Erie R. Co.* v. *Tompkins,* and the cases following that case are to have any validity and effect, it should not be possible for a Circuit Court of Appeals, while rendering lip service to those principles by means of an indiscriminate citation of non-applicable local case-law, to reject applicable and controlling case materials and then, by refusing to cite such applicable and controlling case materials to conceal its disregard of the local state law.

AUTHORITIES CITED BY THE COURT BELOW.

The Circuit Court of Appeals below cited only three Louisiana cases in its opinion. The Court below quoted from and cited the case of *Robideaux* v. *Hebert,* 43 So. 887, as the controlling basis for its decision.

That case, which was decided by the Supreme Court of Louisiana in 1907 dealt with a situation in which a railroad company had furnished Hebert with a spreader under a contract whereby Hebert was to construct a fill for the railroad. In the operation of the spreader Hebert killed the plaintiff's decedent. Hebert and the railroad company were sued on the theory that Hebert was an employee of the Company. The Company defended upon the ground that Hebert was an independent contractor. Although the evidence set forth in the case is meager as to the details of the arrangement between Hebert and the Company the Court held that it was clear from the evidence that Hebert was an independent contractor in the construction of the fill.

The delivery of newspapers to subscribers, as found in the instant case, is a type of work which is far different from that performed by a contractor who is engaged to construct a fill for a railroad company. It does not seem that an adjudication in the "railroad fill" case should be a controlling authority as to a set of facts involving a newspaper motor carrier.

The Circuit Court of Appeals below also cited the Louisiana case of *Marquez* v. *LeBlanc*, (1932) 143 So. 108, in full support of its judgment. That case involved the liability of the Agricultural Credit Corporation for an accident in which one LeBlanc, a crop examiner, was involved. In that case there was no evidence whatever to the effect that LeBlanc, at the time of the accident, was performing any work for the Agricultural Credit Corporation. LeBlanc could go or come as he chose and was not under any one's supervision.

It seems apparent that an adjudication as to the status of a crop examiner, such as LeBlanc, in the cited case, has no bearing whatsoever upon the determination of whether or not a newspaper motor carrier who is delivering papers to subscribers is an employee.

The Circuit Court of Appeals below also cited the Louisiana case of *Abate* v. *Hirdes*, (1929) 121 So. 775, which was decided seven years prior to the case of *Ravare* v. *McCormick & Co.*, (La. App., 1936) 166 So. 183, and ten years prior to the case of *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351, reversed on rehearing on other grounds (La. App., 1939) 191 So. 713, cert. granted Louisiana Supreme Court (See Appendix to Petition, page 25), writ vacated by stipulation of compromise February 5, 1940 (See Appendix to Petition, page 26). These latter cases, discussed hereinbefore, are the ones relied upon by petitioners.

The Abate case is the only Louisiana case cited by the Circuit Court of Appeals below which deals with the question of the liability of a corporate newspaper publisher for the torts of one who was, at the time of the accident, transporting newspapers which had been published by a defendant publisher. The facts in the Abate case are very scantily reported, and for that reason petitioner has set forth in Appendix III to this brief the verbatim report of the testimony of Christopher Hirdes, the truck driver defendant involved in that case (Appen-

dix, page 37). This testimony discloses that Hirdes was not a newspaper carrier who delivered papers to the ultimate reader-subscribers as did Ewell and Neyland in this case, but was a distributor of newspapers to dealers who would sell the newspapers to the public. Indeed, this aspect of the Abate case was recognized by the Court of Appeal of Louisiana when it said, in that case, at page 777 of 121 So:

> "Hirdes was nothing more than a distributor; acting independently; purchasing his wares from the manufacturer and selling them to his customers."

Moreover, in the Abate case, the truck driver had no prescribed route. His customers had no dealings or relationship with the newspaper publisher, as in the case at bar. Further, in the Abate case, it was said, in speaking of whether or not Hirdes was an independent contractor (121 So. at 776):

> "Whether or not he was an independent contractor or an agent depends upon whether or not the Item Company had the right of supervision and control. The actual exercise of that right is not essential. The question depends solely upon the existence of the right."

It thus appears that, in the Abate case, the evidence established the fact that Hirdes was a distributor who bought his papers from the publisher and sold them to dealers for resale, and that the newspaper publisher in that case did not have or exercise any supervision or control whatever over his activities. That case is entirely different from the case at bar wherein the newspaper publisher admitted that some supervision was exercised over Ewell and Neyland who were the newspaper motor carriers operating between the newspaper publisher and its ultimate reader-subscribers.

It thus appears that the Abate case, which is the only Louisiana case cited by the Circuit Court of Appeals below, which is in any way applicable to the case at bar,

is not in point on the facts and is also an authority for your petitioners upon the matter of law involved in this case, viz.: the existence of the right to control the employee's activities as establishing an employer-employee relationship.

The Circuit Court of Appeals below also cited, in "full support" of its decision, nine cases from jurisdictions other than Louisiana, only five of which cases dealt with the liability of newspaper publishers for the torts of its carriers. These cases from foreign jurisdictions were distributed as follows (it should be noted that Judge Hutcheson, who wrote the opinion, practiced law, and lived, in the State of Texas).

Texas: Three cases;
Michigan: One case;
Kentucky: One case;
Missouri: Two cases;
California: One case;
Wyoming: One case.

Although it is true that five of the above cases from foreign jurisdictions dealt with the liability of newspaper publishers for torts of their carriers and decided that the newspaper publishers were not liable for such torts because the carriers were, under the law of the states in question, independent contractors, such cases are not, under the decisions of this Court, to be regarded as controlling authorities in the State of Louisiana in the face of the decisions of the Louisiana courts in the cases of *Ravare* v. *McCormick & Co.*, (La. App., 1936), 166 So. 183, and *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351.

Even if there be a body of "general common law" which is evidenced by the five out-state cases mentioned above, that "general common law" can have no application in Louisiana if, under the provisions of the Louisiana Civil Code and the applicable jurisprudence of Louisiana it has been determined that Louisiana has established and

follows a rule of law which is contrary to the so-called "general common law" rule and which states that a newspaper motor carrier is an employee of the corporate newspaper publisher for which he delivers papers so as to render that corporate newspaper publisher liable for his torts. It is for Louisiana, and Louisiana alone, to say what shall be "the Louisiana Law."

As was said by Mr. Justice Holmes in his dissenting opinion in the case of *Black and White Taxicab and Transfer Company* v. *Brown and Yellow Taxicab and Transfer Company,* (1928) 276 U. S. 518, at 533, 48 S. Ct. 404, 72 L. Ed. 681:

> "The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else. It may be adopted by statute in place of another system previously in force."

And, on page 534, with special reference to the situation in Louisiana, Mr. Justice Holmes said:

> "Louisiana is a living proof that it need not be adopted at all. (I do not know whether under the prevailing doctrine we should regard ourselves as authorities upon the general law of Louisiana superior to those trained in the system.) Whether and how far and in what sense a rule shall be adopted whether called common law or Kentucky law is for the state alone to decide."

Lastly, in support of its judgment, the Circuit Court of Appeals cited Sections 2 and 250 of the American Law Institute's Restatement of the Law of Agency and a portion of Comment (a) which follows Section 250. It should be noted that Section 250 of the Restatement deals with the non-liability of a principal for the torts of an agent who is not a servant. The Court made no reference whatever to Section 220 of the Restatement of the

Law of Agency which sets forth the matters to be considered in arriving at a determination of whether one is an employee (for whose acts the employer is liable) or an independent contractor (for whose acts the principal is not liable). Petitioners mention this point only in passing inasmuch as it is petitioner's contention that the American Law Institute's Restatement of the Law of Agency, being a restatement of common law principles, has no application to, or force within, the State of Louisiana, unless and until the legislature or courts of that state have determined that a specific section of that Restatement is to be regarded as the law of Louisiana under the provisions of the Louisiana Civil Code.

Petitioners submit that the foregoing discussion of the applicability of Louisiana authorities clearly shows that the Circuit Court of Appeals below decided this case in a manner which is contrary to the applicable jurisprudence of Louisiana.

(c) The decision of the Circuit Court of Appeals below is in conflict with decisions of the Fourth, Seventh, Eighth, and Ninth Circuit Courts of Appeals which hold that, in diversity of citizenship cases, the Federal Courts are bound to accept the most recent state court decisions on the subject as establishing the state law.

In determining the applicability of local state law under Section 34 of the Judiciary Act of 1789, four United States Circuit Courts of Appeals have adopted the rule of decision that the most recent pronouncement of the state courts *must* be accepted by the Federal Courts as declaring the law of the state where coordinate decisions of a state's courts are assumed to conflict. The cases so declaring are as follows:

Fourth Circuit:

Dayton & Michigan R. Co. v. *Commissioner of Internal Revenue,* (1940) 112 F. 2d 627, l. c. 630.

Seventh Circuit:

Alexander v. *Missouri State Life Ins. Co.,* (1933) 68 F. 2d 1, l. c. 3.

Eighth Circuit:

Yoder v. *Nu-Enamel Corporation*, (1941) 117 F. 2d 488, l. c. 490.

Ninth Circuit:

Toole County Irr. Dist. v. *Moody*, (1942) 125 F. 2d 498, l. c. 501.

In the case at bar the Circuit Court of Appeals below ignored the latest pronouncements of the Louisiana Courts of Appeal in the cases of *Ravare* v. *McCormick & Co.*, (La. App., 1936) 166 So. 183, and *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351, reversed on other grounds 191 So. 713, which were fully discussed under Point 2 (b), *supra*, and chose to rely on its interpretation of the earlier Louisiana Court of Appeal decision in the case of *Abate* v. *Hirdes*, (1929) 121 So. 775. Petitioners have shown that the Abate case is not in conflict with these later decisions, under Point 2 (b) of petitioners' Argument, *supra*. If the Abate case conflicts or is assumed to conflict with these later cases, then the Court below has failed to follow the most recent declarations of state law as announced by the courts of Louisiana and has not followed the rule applied in the Fourth, Seventh, Eighth and Ninth Circuits in the cases cited above. The Fifth Circuit Court of Appeals has previously indicated that it did not feel bound by such a doctrine in the case of *Sabine Lumber Co.* v. *Broderick*, (1937) 88 F. 2d 586, l. c. 588, where it said, in speaking of a case in which there were conflicting decisions within the state:

> "Considering the conflict in the Louisiana jurisprudence, the District Court was entitled to follow the decisions he considered correctly stated the law."

This is an important question which will recur daily in the administration of justice by the Federal system of Courts in diversity of citizenship cases. This Court should determine the proper rule to be followed.

(d) The Court below erred in holding that, under the circumstances, the admission, embodied in the listing of the motor carrier in the insurance policy as a "class 1 employee" was not sufficient to take the case to the jury. This holding of the Court below conflicts with the decision of the Tenth Circuit Court of Appeals in Ryan-Richards, Inc., v. Whitesides, (Okla., 1938) 96 F. 2d 826, and with the decision of the Louisiana Court of Appeal in Jones v. Shehee Ford Wagon and Harness Co., Inc., (1934) 163 So. 129.

This point is, in our opinion, a very important one. In Louisiana jurisprudence the word "employee" is used to denote one for whose torts the employer is liable, while the term "independent contractor" is used to denote one for whose torts the employer is not liable. See *Jones v. Shehee Ford Wagon and Harness Co., Inc.*, (La. App., 1934) 163 So. 129, l. c. 132. The description of the motor carrier Ewell as a "class 1 employee" by the newspaper publisher in this case, when coupled with the other evidence herein, was amply sufficient to take the case to the jury, but the Circuit Court of Appeals below refused so to hold, and so rendered a decision which is in conflict with the decision of the Tenth Circuit Court of Appeals in the case of *Ryan-Richards, Inc.*, v. *Whitesides*, (Okla. 1938), 96 F. 2d 826. Limitations of time will not permit further treatment of this point, which is treated adequately and clearly in the paragraph numbered 6 in "Reasons Relied Upon For Allowance of Writ" in petitioners' Petition for Writ of Certiorari.

(e) The decision of the Circuit Court of Appeals below holding that, as a matter of law, the respondent insurer was not liable deprives the petitioners of the right to trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States.

Our position in respect to this point is stated in the Petition for Certiorari under the paragraph numbered 7 in "Reasons Relied Upon For Allowance of Writ." In a sense the point is involved in the question of applying the applicable local jurisprudence. It is also involved in a consideration of the right of a Judge to exercise his "intuition" to set aside a jury verdict. Our theory is that of Mr. Justice Black in his dissenting opinion in *New York*

Life Insurance Co. v. *Gamer,* 303 U. S. 161, l. c. 172, which foreshadowed the opinion in the Erie case. The Louisiana jurisprudence and the Louisiana trained District Judge in the case at bar both agree that the petitioners had made a case for the jury. The decision of the Circuit Court of Appeals below substituted its determination on this point for the verdict of a Louisiana jury. The opinion of this Court in the case of *Stoner* v. *New York Life Insurance Co.,* 311 U. S. 464, states clearly that such action is erroneous. The action of the Circuit Court of Appeals is clearly violative of the Seventh Amendment to the Constitution of the United States.

Conclusion.

Petitioners humbly request this Court to exercise its discretionary powers to the end that justice may be served and the judgment of the District Court be reinstated.

Respectfully submitted,

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APPENDIX I.

Excerpts from Constitution of Louisiana for the Year 1921, Dealing with Jurisdiction of the Three Appellate Courts of Louisiana and with Jurisdiction of the Supreme Court of Louisiana:

Article VI, Section 10, of the Constitution of 1921 of the State of Louisiana, reads as follows:

"Supervisory powers -- Original and appellate jurisdiction. -- The Supreme Court shall have control of, and general supervision over all inferior courts and shall have further jurisdiction as follows:

It shall have exclusive original jurisdiction in all disbarment cases involving misconduct of members of the bar, with the power to suspend or disbar under such rules as may be adopted by the court, and in suits for removal of judges of courts of record from office as elsewhere provided in this Constitution. It shall also have original jurisdiction for the determination of questions of fact affecting its own appellate jurisdiction in any case pending before it; and to that end may make such orders and decrees as it may deem proper in the premises.

It shall have appellate jurisdiction in civil suits where the amount in dispute or the fund to be distributed, irrespective of the amount therein claimed, shall exceed two thousand dollars exclusive of interest, *except in suits for damages for physical injuries to, or for the death of a person, or for other damages sustained by such person or his heirs or legal representatives, arising out of the same circumstances;* nor shall such appellate jurisdiction extend to any suit for compensation under any State or Federal Workmen's compensation law, or employer's liability act; provided, that appeals properly granted to the Supreme Court, in such excepted cases, prior to the adoption of this Constitution, shall be finally disposed of by said court.

It shall have appellate jurisdiction of all suits for divorce or separation from bed and board, and of all matters arising therein; of suits involving alimony, of suits for the nullity of marriage, for interdiction, or involving the tutorship of minors, or curatorship of interdicts, or the legitimacy, or custody of children, and of matters of adoption and emancipation.

It shall have appellate jurisdiction in all cases wherein the constitutionality or legality of any tax, local improvement assessment, toll or impost levied by the State, or by any parish, municipality, board, or subdivision of the State is contested, or where the legality, or constitutionality of any fine, forfeiture or penalty imposed by a parish, municipal, corporation, board, or subdivision of the State shall be in contest, whatever may be the amount thereof, and in all cases wherein an ordinance of a parish, municipal corporation, board, or subdivision of the State, or a law of this State has been declared unconstitutional. Its appellate jurisdiction shall also extend to all cases involving homestead exemptions irrespective of the amount involved, and the appeal on the law and the facts shall be directly from the court in which the case originated to the Supreme Court; except that in cases involving only movable property, the appeal shall lie to the court having jurisdiction of the amount or the value of the property involved.

In all civil and probate cases where the Supreme Court is given appellate jurisdiction, the appeal shall be both upon the law and the facts.

The appellate jurisdiction of the Supreme Court shall also extend to criminal cases on questions of law alone whenever the penalty of death, or imprisonment at hard labor may be imposed; or where a fine exceeding three hundred dollars or imprisonment exceeding six months has been actually imposed." (Emphasis ours)

Article VII, section 11 of the Constitution of 1921 of the State of Louisiana reads as follows:

"Writs of certiorari or other writs to Courts of Appeal -- Judgments of Courts of Appeal -- When

executory. -- It shall be competent for the Supreme Court to require by writ of certiorari, or otherwise, any case to be certified from the Courts of Appeal to it for review, with the same power and authority in the case as if it had been carried directly by appeal to the said court; provided, that where the application is based solely upon the ground that the decision of the question of law involved is in conflict with the jurisprudence of the Supreme Court or another Court of Appeal upon a question not yet decided by the Supreme Court, and it is found that such is the fact, then the application shall be granted as a matter of right; provided, however, that the Supreme Court shall in no case exercise the power conferred by this Article unless the application shall have been made to the court or to one of the justices thereof within thirty days after a rehearing shall have been refused by the Court of Appeal; and provided further, that the judgment of the Court of Appeal shall not become executory until the expiration of thirty days; or, in cases in which application is made for the writ of review, or other writs, until the decision of the Supreme Court upon the application shall have become final."

The provision in the Constitution creating the Courts of Appeal is Article VII, Section 20, of the Constitution of 1921 of the State of Louisiana, which reads as follows:

"Courts of Appeal, circuits and districts. -- Exclusive of the parishes from which appeals are returnable to the Court of Appeal for the parish of Orleans, the State shall be divided into two circuits, to be subdivided into districts as hereinafter provided.

Until otherwise provided by law, the parishes of East Baton Rouge, West Baton Rouge, Livingston, Tangibahoa, Washington, St. Helena, Pointe Coupee, Iberville, St. Mary, Terrebonne, Assumption, Lafourche, Ascension, Calcasieu, Allen, Beauregard, Jefferson Davis, Cameron, Vermilion, Lafayette, Iberia, St. Martin, St. Tammany, Acadia, East Feliciana, West Feliciana, St. Landry, Evangeline, and Vernon shall compose the First Circuit and be known as the 'Court of Appeal, First Circuit, State of Louisiana,'

and the parishes of Caddo, Bossier, Webster, Bienville, Claiborne, Union, Lincoln, Jackson, Caldwell, Winn, Natchitoches, Sabine, DeSoto, Red River, Ouachita, Richland, Franklin, Catahoula, LaSalle, Concordia, Tensas, Madison, East Carroll, West Carroll, Morehouse, Avoyelles, Rapides and Grant shall compose the Second Circuit, and be known as the 'Court of Appeal, Second Circuit, State of Louisiana.'

The circuits above provided for, until otherwise provided by law, shall each be divided into three districts, as follows:

The parishes of Calcasieu, Allen, Beauregard, Jefferson Davis, Cameron, Vermilion, Lafayette, St. Martin, Acadia, St. Landry, Evangeline, Vernon and Iberia shall compose the first district of the first circuit.

The parishes of West Baton Rouge, Ascension, Pointe Coupee, Iberville, St. Mary, Terrebonne, Assumption and Lafourche shall compose the second district of the first circuit.

The parishes of East Baton Rouge, Livingston, Tangipahoa, St. Helena, St. Tammany, East Feliciana, West Feliciana and Washington shall compose the third district of the first circuit.

The parishes of Richland, Concordia, East Carroll, West Carroll, Franklin, Catahoula, LaSalle, Tensas, Ouachita, Madison and Morehouse shall compose the first district of the second circuit.

The parishes of Bienville, Claiborne, Jackson, Lincoln, Caldwell, Union, Bossier, Winn, Webster, and Grant shall compose the second district of the second circuit.

The parishes of Caddo, DeSoto, Natchitoches, Rapides, Sabine, Avoyelles and Red River shall compose the third district of the second circuit.

For each of the circuits there shall be elected three judges as herein provided for, one judge to be elected by the qualified electors of each district as above designated."

Article VII, Section 29 of the Constitution of 1921 of the State of Louisiana which defines the jurisdiction of the Courts of Appeal, reads as follows:

"Original and appellate and concurrent jurisdiction. -- The Courts of Appeal, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases, civil and probate, of which the Civil District Court for the Parish of Orleans, or the District Courts throughout the State, have exclusive original jurisdiction, regardless of the amount involved, or concurrent jurisdiction exceeding one hundred dollars, exclusive of interest, and of which the Supreme Court is not given jurisdiction, except as otherwise provided in this Constitution, and [redacted]als shall be both upon the law and the fact[redacted]



APPENDIX II.

(a). Provisions of Louisiana Code of Practice Providing for Trial by Jury in Civil Cases.

Article 494 of the Louisiana Code of Practice provides for trial by jury. We quote that Article as follows:

> "Plaintiff requesting jury -- Causes triable without jury -- Exceptions. -- The plaintiff who wishes for a jury must pray for the same, either in his original petition, or by a supplemental petition, which must be presented before the suit be set for trial; provided, that all suits against makers and indorsers of promissory notes, drawers, indorsers and acceptors of bills of exchange, and generally all suits brought on unconditional obligations to pay a specific sum of money, shall be tried without a jury, unless the defendant shall make oath that his signature to said note, or other obligations, is not genuine, or that he expects to prove that the same had been obtained through fraud or error, or want or failure of consideration, or in cases where the defendant in his answer may set up a plea of compensation or reconvention, and make oath to the truth of all the allegations in said plea or answer."

We quote also Article 495 of the Louisiana Code of Practice with respect to the defendant's right to a trial by jury, as follows:

> "Defendant requesting jury. -- The defendant, in order to avail himself of the same privilege, must pray for a jury in his answer, or previous to the suit being set down for trial.
>
> Nevertheless, if in his answer the defendant has only declined the jurisdiction of the court, without answering to the merits, he may, if the plea be overruled, pray for a jury in his answer to the merits."

(b). Excerpt from Decision of Louisiana Supreme Court in the Case of Parish v. Holland (Holland Intervenor) 166 La. 24, 116 So. 580, Construing Provisions of Louisiana Code of Practice Providing for Trial by Jury in Civil Cases.

In the case of *Parish* v. *Holland*, (Holland, intervenor) (Louisiana Supreme Court March 12, 1928, rehearing denied April 9, 1928) 116 So. 580, 166 La. 24, the defendant in its answer prayed for a trial by jury. The Court entered an order directing that the case be tried by jury and later revoked the order. On appeal to the Supreme Court, the Supreme Court said this:

> "Articles 494 and 495, C. P., provide that the plaintiff or defendant, to avail himself of the privilege, must pray for a jury before the case is set down for trial. When this is done, in a case that may be tried by a jury, and the required cash deposit is made, and bond for jury costs is filed, the right to a trial by jury is absolute. In such cases it has been held that a trial by jury cannot be refused, even when the application is made for the purpose of delay. *Reynold's Curator* v. *Mahle*, 12 La. 425; *Frellson* v. *McDonald, and Coon*, 15 La. Ann. 536."

APPENDIX III.

Verbatim Report of Testimony from Case of Abate v. Hirdes, (La. App., 1929) 121 So. 775.

"CHRISTOPHER HIRDES, being duly sworn, testified as follows:

Direct Examination.

Mr. Deutsch:

Q. Who owns that truck? A. I do.

Q. Does the Item Company control the manner of your doing your work? A. No, sir. That is my truck; I do what I want with it.

Q. Do you permit them to control your work, or to interfere in it? A. No, sir.

Q. Are they satisfied if you show the results, regardless of the way in which you do it? A. Yes, sir.

Q. Can the Item tell you what streets to take? A. No, sir.

Q. Can they tell you what route you are supposed to use? A. No, sir.

Q. What do they tell you to do? A. They tell me to do - I go in and pay cash for my papers, and bring them out to whoever I feel like bringing them out to.

Q. Who pays for your gas and for the oil? A. I do.

Q. Who pays for the tires? A. I do.

Q. And for the repairs to the tires? A. I do.

Q. Do you use your truck on Sundays? A. Yes, sir: and nights, too.

Q. Do you use it any other time? A. Any time I feel like using it.

Q. Do you use it for your own personal needs? A. I take my family out in it.

Q. Who pays your labor? A. I pay the little boy.

Q. For whom does he work? A. For me.

Q. Does the Item tell you whom to employ and whom not to employ? A. No, sir.

Q. Can the Item Company fire that boy? A. No, sir.

Q. Is there anything to prevent you from hiring somebody else to drive the truck and do that work?

Mr. Woodville: I object to that as leading.

The Court: You might ask him what he can do. I think the question is objectionable in that form, - "Is there anything to prevent him", - calling for a question of opinion.

Mr. Deutsch:

Q. Does anybody else ever drive your truck? A. Yes, sir. I had somebody to drive it today, and every time I had to come to Court. I had to put somebody in my place to run the truck.

Q. Have you ever used that truck for anything else? A. Yes, sir: I make loads with it every chance I get.

The Court:

Q. Who selects the driver when you are not on the truck?

A. I do, myself.

Mr. Deutsch:

Q. Is there anything in your agreement with the Item, whereby you have to use that truck for that work? A. No, sir.

Q. Could you use some other truck? A. Yes, sir.

Q. Could you use a bicycle, if you wanted? A. I used one a couple of weeks ago. I had to get another to do the work with; mine was in the shop.

Cross Examination.

Mr. Woodville:

Q. What salary does the Item pay you for doing that work? A. A small salary, and commission on papers.

Q. How much is your salary? A. I get twenty dollars a week.

Q. And a commission based on the number of papers delivered by you? A. Yes, sir.

Q. You have a fixed territory in which you deliver papers? A. I can give papers to anybody I want, in any part of my territory.

Q. There is no limit to your territory? A. Yes, I have a limit to my territory.

Q. The Item pays you twenty dollars a week and a commission on the number of papers sold within a certain territory, in consideration of your delivering those papers - - A. I can sell them out of my territory, if I have a chance to. The Item cannot stop me from selling papers wherever I want to.

Q. You have no fixed territory in which to deliver? A. No, I can take papers - which I do now - I bring some back to City Park and Canal, or out Tonti Street, in the twenty five hundred block.

Q. Now, in delivering those papers, - there are two afternoon papers in the city of New Orleans, the Item and the States? A. Two evening papers, yes, sir.

Q. Both those papers, is it not a fact, come off the press, each of their editions, about the same time? A. Probably so.

Q. Well, you know that? A. Yes, sir.

Q. And every afternoon, at the time of the issuance of the various editions, there is a grand rush on the street, in the competition between the two papers, to try to get to a certain location as quickly as possible? A. No, sir, not for me.

Q. You don't care how far behind the States you get to a certain corner? A. No, sir; the idea is, I take my paters out and I have very near an hour and a half with the Pink edition, to get back with my other edition. I have an hour and a half.

Q. The success of getting rid of the papers depend on your getting the edition to a certain location as quickly as possible and quicker than the States? A. My own is mostly druggists, on that edition.

Q. The edition you were delivering on that particular occasion? A. Yes, sir.

Q. The States sends papers to those same drug stores? A. I don't know.

Q. Don't you know? A. I don't know. I have drug stores that the States is not delivered to.

Q. Have you seen States papers in the same drug stores that you deliver Items to? A. Some of them, yes, sir.

Q. You have no occasion to try to get your Items there as quickly as the States? A. I get them there as fast as I can, of course.

Q. As a matter of fact, do not the States and Item delivery trucks race through the streets, so as to beat each other to the different stations? A. The Item trucks - - -

Q. The Item and States trucks race through the streets, to beat each other to the different stations? A. I don't know about any more than my own truck.

Q. You never see them racing to beat each other to the station? A. I don't do any racing on my truck. If I ran into anybody with the truck, or break it, I have all the responsibility on myself, and all repairs I have to have done.

Q. How big a truck is that. A. A Ford one-half ton truck.

Q. How short can you stop it, going at fifteen miles an hour; within how short of a space; about six or seven feet, can't you? A. It depends on the weather. If it is any way damp, you can slip

Q. On a dry asphalt surface, one half ton truck, fifteen miles an hour, can you stop in six or seven feet, if the brakes are good? A. Yes, sir."

MAY 3 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 938

LYMAN FLENIKEN, ET AL.,
Petitioners,

versus

GREAT AMERICAN INDEMNITY COMPANY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT, GREAT AMERICAN INDEMNITY COMPANY.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT, GREAT AMERICAN INDEMNITY COMPANY.

STATEMENT OF THE CASE

The case is accurately stated in the opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 268-273). It is inaccurately stated in the petition of the petitioners (pages 4 and 5) in the following respects: Robert Neyland, the driver of the automobile involved in the collision with a motorcycle occupied by the petitioners, was employed solely by Garland D. Ewell, the owner of the automobile (R. 223-225). Capital City Press (hereinafter called "the Press") had knowledge that Neyland was employed by Ewell but never consented thereto (R. 179,

180, 198, 199), its consent being unnecessary because of the independent contractor relationship existing between Ewell and the Press. Neyland was not operating the truck under an oral agreement with the Press, the agreement being solely between Ewell and the Press. (R. 177, 197, 225.) Ewell collected from all his customers. The Press collected from none of them (R. 180, 199). Ewell was in complete charge of his route and of the delivery of papers to his customers, and no attempt whatsoever was made by the Press to supervise or direct Ewell, or anyone he might employ, relative to the operation or use of the car or the way in which he should deliver his papers (R. 270, 271; Manship's testimony, R. 124, 125 and Sholar's testimony, R. 92, 96). Neither the time nor the place nor the manner of delivery of papers was subject to control by the Press.

THE ISSUE

The sole issue is whether Ewell was an independent contractor or a servant or agent of the Press.

ARGUMENT

The Circuit Court of Appeals correctly construed Articles 2317 and 2320, Louisiana Revised Civil Code.

An employer is liable for the torts of his servant committed in the discharge of his duties, but for the torts of an independent contractor he is not liable. "Master", "servant" and "independent contractor" are defined in RESTATEMENT OF THE LAW on the subject of AGENCY, page 11, as follows:

> "Sec. 2. Master, Servant; Independent Contractor.

"(1) A master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.

"(2) A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right of control by the master.

"(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."

The governing principle is the same in Louisiana. *Robideaux vs. Hebert*, 118 La. 1089, 43 So. 887. In construing this article the Circuit Court of Appeals said:

R. 273, 274, 275

" * * * Appellant insists that the undisputed evidence established as a matter of law that neither Neyland nor Ewell was a servant of the Press for whose acts it was liable, but that Ewell was an independent contractor in respect of work the Press desired done, 'the manner of the doing of which, including the employment, payment and control of the labor, is left (fol. 275) entirely to him'; that he is, therefore, 'an independent contractor for whose acts and omissions in the execution of such contract, the other contracting party is not liable since the doctrine of *respondeat superior* has no application where the employee represents the employer only as to the lawful purpose of the contract but does not represent him in the means by which that purpose is to be accomplished, and the assertion of liability is based on something done or omitted in the use of such means.' *Robi-*

deaux v. Hebert, 43 So. 887. See also in full support: *American National Ins. Co. v. Denke*, 95 S. W. (2) 372; *Marquez v. LeBlanc*, 143 So. 108; *Abate v. Hirdes*, 121 So. 775; *Gall v. Detroit Journal*, 158 N.W. 36; 19 A.L.R. 1164; *Skidmore v. Haggard*, 110 S.W. (2) 726; *Bass v. Kansas City Journal Post*, 148 S.W. (2) 548; *Carter Publications, Inc. v. Davis*, 68 S.W. (2) 640; *Bohanon v. James McClatchy Pub. Co.*, 60 Pac. (2) 510; *American Savings Life Ins. Co. v. Riplinger*, 60 S.W. (2) 115; *National Cash Register Co. v. Rider*, 24 S.W. (2) 28; A.L.I. *Restatement of Law of Agency*, page 11, Secs. 2[2] and 250;[3] *Stockwell v. Morris*, 22 Pac. (2) 189 (fol. 276). **We think it clear that appellant is right.** The principle controlling here is so clearly stated in the *Robideaux* case, *supra*, and so fully supported by the jurisprudence of Louisiana and elsewhere (see the long list of cases cited in the *Denke* case, *supra*, at pages 373-4) that a dissertation from us would serve no useful purpose. Appellees' reliance on the fact that Ewell was listed as an employee is unavailing both because under the terms of the policy and the law as settled in Louisiana, the insurer is not liable unless the insured would be, and because whether Ewell was or was not an employee is not material.

> " * * * If, on the other hand, he was engaged merely, **as the undisputed facts show here he was,** to get something (fol. 277) done which the person employing him wanted done, and the means of performing the work were left to him with no control over physical details as to the manner of performance, whether he is called agent or independent contractor, the person so contracting with him would not be liable for injuries growing out of the use of such means. * * * " (Bold-face type ours.)

The Circuit Court of Appeals was correct in holding the evidence insufficient to make a case for the jury, and it was correct in holding that the District Judge should

have directed verdict in favor of respondent. The rule is stated thus in *Moore's Federal Practice*, Vol. 3, page 3104:

> " * * * a verdict will normally be directed where both the facts and the inferences to be drawn therefrom, as supported by the overwhelming weight of the evidence, point so strongly in favor of one party or the other that the court feels reasonable men could not possibly come to a contrary conclusion."

As authority the text writer cites:

> *North Penn. Railroad v. Commercial Bank*, 123 U.S. 727, 8 S. Ct. 266, 31 L. Ed. 287; *Delaware L. & W. R. Co. v. Converse*, 139 U.S. 469, 11 S. Ct. 569, 35 L. Ed. 213; *Gunning v. Cooley*, 281 U.S. 90, 50 S. Ct. 231, 74 L. Ed. 720; *Gorham v. Mutual Benefit Health & Accident Association*, 114 Fed. (2d) 97 (cert. denied 61 S. Ct. 615).

On page 14 of their brief petitioners state that "Under Section 34 of the Judiciary Act of 1789, the Circuit Court of Appeals was bound to follow the applicable jurisprudence of Louisiana". They cite *Erie Railroad Co. vs. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188; *West vs. American T. & T. Co.*, 311 U.S. 223, 61 S. Ct. 179, 85 L. Ed. 139; *Moore vs. Illinois Central Railroad Co.*, 312 U.S. 630, 85 L. Ed. 1089. It is our interpretation of these decisions that the federal courts are bound to follow the **latest** decision of the **highest** court of the state. This does not mean that they must follow the decision of an intermediate court where that decision conflicts with the decision of the highest court, even though the decision of the intermediate court might be later than that of the highest court. We quote pertinent excerpts from the *West* case:

> "True, as was intimated in the Erie R. Co. case, the highest court of the state is the final arbiter of what is state law. * * *

> " * * * State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts. * * * "

The leading Louisiana case as to what constitutes an independent contractor is *Robideaux vs. Hebert*, 118 La. 1089, 43 So. 887, *supra*, decided by the Louisiana Supreme Court in 1907. In that case the Supreme Court of Louisiana said that Hebert was an independent contractor although the defendant Railroad Company furnished him with a spreader and other equipment and transferred the equipment and laborers to the job, because Hebert was employed to do certain work at a specified price and

> " * * * the manner of its doing, including the employment, payment and control of the labor, was left entirely to him. He was, therefore, an independent contractor, for whose acts in the performance of a lawful contract his employer is not liable, since the doctrine of *respondeat superior* has no application where the employe represents the employer only as to the lawful purpose of the contract, but does not represent him in the means by which that purpose is to be accomplished, and the assertion of liability is based on something done or omitted in the use of such means."

As late as 1941 the Circuit Court of Appeals for the Fifth Circuit, speaking through the late lamented Judge Foster, educated, trained and experienced in the Louisiana Law, said that *Robideaux vs. Hebert*, expressed the law of Louisiana on this subject. *Daroca vs. Metropolitan Life Ins. Co.*, 121 F. (2d) 917.

The leading case in Louisiana involving newspaper carriers is *Abate, et al. vs. Hirdes, et al.*, 9 La. App. 688, 121 So. 775, decided by the Circuit Court of Appeal for Orleans. **The Supreme Court of Louisiana refused a writ of certiorari or review on the ground that "On the facts found by the Court of Appeal the judgment is correct."** (Appendix I.) Hirdes was a carrier for the Item Company. The plaintiff, Abate, who was injured when struck by a car driven by Hirdes while delivering newspapers, sought to hold the Item Company under the doctrine of *respondeat superior*. In holding that Hirdes was an independent contractor, the Court said on page 690 of 9 La. App.:

> "It is said that because The Item Company paid Hirdes a weekly salary, or stipend of $20.00, he became the agent of the company, and it became liable and responsible for all acts done by him within the scope of his employment. We do not believe that the payment of a regular wage, or stipend, or salary, whatever it may be called, renders the payer liable for all of the acts of the receiver. It appears from the evidence that **The Item Company had nothing whatever to do with the operations of the truck. It was owned by Hirdes. He paid for the gasoline and oil and the repairs. He used it in other hauling, or in his private affairs. The only requirements that The Item Company made were two: First, that he deliver no other afternoon paper, and, Second, that he produce satisfactory results in the territory allotted to him. As long as he did this the company had no right to complain as to his method of driving the truck, as to the route taken by him in delivering his papers, as to who should help him in his work, as to whether he should drive the truck himself or employ someone else, or as to any other matters relating to the conduct of his particular end of the business.** (Bold-face type ours.)
>
> " * * * * *

> " * * * In fact, it does not seem that the contract really provided for what may strictly be called salary or wages. Mr. Thompson of The Item Company states that the only reason for the payment of a weekly amount to Hirdes was that the company knew what his living requirements were, and that the territory allotted to him would probably not produce sufficient commissions to afford him a proper living; that it was to the interest of The Item Company to have someone solicit subscriptions and deliver papers in that territory, and that in order to obtain a man of Hirdes' ability, the company had supplemented his commissions by what really was no more than a gratuitous addition to his earnings. * * * Hirdes was nothing more than a distributor; acting independently; purchasing his wares from the manufacturer and selling them to his customers. If the Item Company is liable here, it appears to us that every distributor, every retailer, may by his negligent acts make the wholesaler or manufacturer liable under circumstances over which the manufacturer has no possibility of exercising control or supervision."

The Louisiana Court of Appeal for Orleans said in *Marquez vs. LeBlanc*, 143 So. 108:

> "That the service is in the furtherance of the employer's business is not enough. It must be so far his business as to be his own work and undertaking. The engagement of others to do the work does not affect his responsibility. But when the undertaking is that of the person engaged to do it, and the employer is only concerned in the result, the latter's responsibility fails since the undertaking is not his. * * * "

The Supreme Court of Louisiana also refused a writ in the *Marquez* case. (Appendix II.)

When the Louisiana Supreme Court refuses to issue a writ of certiorari or review in a case decided by one of

the Courts of Appeal and assigns as the reason for refusing the writ that the judgment is correct, it may be said that the Supreme Court affirms, or at least approves, the decision. *Carrere vs. City of New Orleans*, 162 La. 981, 1015, 111 So. 393, 405; *State vs. Ardoin*, 197 La. 877, 890, 2 So. 2d 633, 637. The Louisiana Courts of Appeal consider that where the Louisiana Supreme Court refuses to review a decision of a Louisiana Court of Appeal, it is tantamount to approving it. *Walker vs. George, et al.*, 146 So. 347.

Petitioners rely strongly upon the cases of *Ravare vs. McCormick & Co.*, 166 So. 183, decided by the Louisiana Court of Appeal for the Second Circuit, and *Gallaher vs. Ricketts*, 187 So. 351 (reversed on rehearing 191 So. 713), decided by the Louisiana Court of Appeal for Orleans, and state that "If the case had been tried in the courts of Louisiana (where it would have been tried except for diversity of citizenship), the decisions in the Ravare case and the Gallaher case would have been applied and followed." (Petitioners' brief, page 15.) We disagree. The Court of Appeal for the Fifth Circuit correctly stated that:

> "The Louisiana Court of Appeals cases on which appellees rely, are not in conflict with the settled Louisiana rule. Their facts completely distinguish them from the case at bar." (R. 275).

We submit that this statement is correct. Briefly, the facts in the instant case and in the *Abate*, *Ravare* and *Gallaher* cases are as follows:

THE FLENIKEN CASE

1. Ewell supplied his route and his customers.
2. Ewell furnished the means of transportation, namely, an automobile.

3. Ewell maintained his automobile, buying the gasoline and oil that he used and keeping it in repair.
4. Ewell applied and paid for insurance on his car.
5. Ewell hired his own employees without consulting the Press.
6. Ewell solicited his own customers.
7. Ewell collected from his own customers, kept the money and did not, and was not required to, account for the same.
8. Ewell fixed his own rate for the State Times and Morning Advocate and some of these rates were higher than the published rate of the Press.
9. Ewell was in complete charge of the physical conduct of his business.
10. Ewell was not supervised to any exent by the Press.
11. Ewell delivered bread, cakes and pastry made by Wolf's Bakery, collected articles for dry cleaning for Ideal Laundry on a commission basis, transported copies of the Times-Picayune and Item and transported other articles to his customers.
12. Ewell was not carried on the records of the Press as one of its employees.
13. The Press paid no social security tax for Ewell or for any of his employees.
14. Ewell selected his own means of transportation.
15. Ewell was not required to give bond.
16. Ewell had no regular hours of work.
17. Ewell took holidays at his discretion.

18. The Press did not have a list of Ewell's subscribers and never attempted to ascertain their names.

19. Although the Press furnished to its carriers the names of newcomers to Baton Rouge and its vicinity and furnished extra copies of its newspapers to its carriers, delivery thereof was entirely optional with the carrier.

20. There was no painting, marking or other inscription on Ewell's car showing that he delivered copies of the newspapers.

21. Both Ewell and the Press considered Ewell an independent contractor.

THE ABATE CASE

("Writ refused [by La. Supreme Court.]. On the facts found by the Court of Appeal the judgment is correct." See Appendix I.)

1. Hirdes owned his own truck.

2. Hirdes paid for gasoline and oil consumed by his truck and kept the truck in repair.

3. Hirdes used his truck in hauling other things, and in private affairs.

4. Hirdes truck had the name "Item Tribune" painted on it.

5. The Item Company required that he deliver no other afternoon paper.

6. The Item Company required satisfactory results.

7. The Item Company had no right to complain about his driving.

8. The Item Company could not direct his route.

9. The Item Company could not select his help.

10. The Item Company could not order him or anyone else to drive the truck.

11. The Item Company could not direct him or his employees as to any other matter.

(It is noted that even though Hirdes' truck had the name "Item Tribune" painted on it and that the Item Company prohibited him from delivering any other afternoon paper, neither of which conditions exists in the *Fleniken* case, nevertheless the Louisiana Court of Appeal for Orleans held that Hirdes was an independent contractor. By denying certiorari the Louisiana Supreme Court approved the holding. The facts in the *Fleniken* case are much stronger for respondent than the facts in the *Hirdes* case.)

THE RAVARE CASE

(As stated in the opinion of the La. Court of Appeal, 186 So. 183, 187: "The facts in the case at bar, however, can be readily distinguished from those in the above case [*Abate vs. Hirdes*].")

1. The car driven by Lacombe, the alleged carrier, was actually owned by McCormick & Company, according to the Court's finding.

2. McCormick kept a board listing all Lacombe's customers and agents on his route.

3. Checks and cash were received by McCormick & Company.

4. McCormick & Company provided form notices of expiration for Lacombe to furnish his subscribers.

5. Lacombe delivered to Mrs. Medici in Marksville, Louisiana copies of the Daily Town Talk, which were purchased from McCormick & Company by her and she paid McCormick

& Company direct and not as Lacombe's sub-agent.

6. Various instructions were placed on a bulletin board at McCormick & Company's office for Lacombe's benefit.
7. Lacombe reported to the circulation manager daily "not for instructions" but to turn in money collected. "This is a fact admitted by him, very inconsistent with an independent contractor relationship."
8. Lacombe was obliged to get new customers.
9. Lacombe was obliged to advertise the paper.
10. The circulation manager expected Lacombe to increase circulation in his territory, to deliver his papers in reasonable time and to consult with him.
11. McCormick & Company had "some supervision" over Lacombe.
12. Lacombe's customers could look to McCormick & Company for delivery of papers, "which they gladly did".

(In passing the Court made this very significant and pertinent statement, viz:

> "Independent contractors usually employ subcontractors to help complete their job or perform their tasks." 166 So. 183, 188.

Ewell followed this custom; in fact, at the very moment of the accident Ewell's employee, Neyland, (not the Press' employee) was driving Ewell's automobile.

THE GALLAHER CASE

This case is not authority for the reason that on rehearing the Louisiana Court of Appeal for the Second

Circuit decided that there was no liability because at the time of the accident, Ricketts, who distributed copies of the Times-Picayune, was on his way to attend a "pep" meeting, which he was not required to attend by The Times-Picayune Publishing Company. The reasons for the decision, on rehearing, therefore, have no bearing, but if they did, that case is distinguishable from the instant case for the following reasons:

1. Times-Picayune Publishing Company owned Ricketts' route, whereas Ewell owned his own route.
2. Times-Picayune Publishing Company required a fidelity bond of Ricketts; Capital City Press did not.
3. Times-Picayune Publishing Company conducted classes for Ricketts' benefit; Capital City Press did not.
4. Times-Picayune Publishing Company could supervise Ricketts' work; Capital City Press could not.

Moreover, according to the plaintiff's petition to the Louisiana Supreme Court for a writ of certiorari or review to the Orleans Court of Appeal, at the time of the accident, "Ricketts was going to the office of The Times-Picayune Publishing Company **under orders of The Times-Picayune Publishing Company** * * * " to attend a "pep" or instructional meeting. Subsequently the case was compromised and dismissed on joint motion of the plaintiff and defendant. (Bold-face type ours.)

Hence, it is submitted that the Circuit Court of Appeals for the Fifth Circuit properly distinguished the *Ravare* and the *Gallaher* cases from the *Fleniken* case, and properly followed the rulings of the Louisiana Su-

preme Court in the *Robideaux*, *Abate* and *Marquez* cases. Assuming, *arguendo*, that the *Ravare* and *Gallaher* cases are not distinguishable and are in conflict with the ruling in the *Robideaux*, *Abate* and *Marquez* cases, nevertheless the Circuit Court of Appeals for the Fifth Circuit was obliged to follow the rule enunciated in the last three named cases, being the latest expression of the highest court in Louisiana on the subject. *Erie Railroad Co. vs. Tompkins, supra; West vs. American T. & T. Co., supra; Stoner vs. New York Life Ins. Co.*, 311 U.S. 464, 61 S. Ct. 336, 85 L. Ed. 284.

The decision of the Circuit Court of Appeals below is not in conflict with the decisions of the Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeal

On page 18 of their petition for certiorari petitioners state:

> "5. The Circuit Court of Appeals below rendered a decision in conflict with decisions of the Fourth, Seventh, Eight and Ninth Circuit Courts of Appeals in this: The Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeals have held that, in determining the applicable local law, the most recent pronouncement of the state courts must be accepted by the Federal Courts as declaring the law of the state where coordinate decisions of a state's courts are conflicting or are assumed to conflict. Fourth Circuit: Dayton & Michigan R. Co. v. Commissioner of Internal Revenue, (1940) 112 F. 2d 627, l. c. 630; Seventh Circuit: Alexander v. Missouri State Life Ins. Co., (1933) 68 F. 2d 1, l. c. 3; Eighth Circuit: Yoder v. Nu-Enamel Corporation, (1941) 117 F. 2d 488, l. c. 490; Ninth Circuit: Toole County Irr. Dist. v. Moody (1942) 125 F. 2d 498, l. c. 501."

In every one of these cases the courts recognized that where the highest court of a state has decided a matter, the Federal Court is bound to follow the state court's decision. But it did not hold that where a decision of an intermediate court is in conflict with a decision of the highest court, the decision of the intermediate court, though later than the decision of the highest court, must be followed. Those decisions held that if there were any inconsistency in the opinion of the highest court with respect to rulings on the same subject matter, then the latest opinion must be followed. The question presented in each of the cited cases was whether the latest decision of the highest court was controlling upon the federal courts where there was a conflict between the latest decision and earlier decisions of the same court. The courts in the named circuits held that the federal courts must follow the latest expression of the state court. However, as pointed out above, if there is any conflict between the Louisiana decisions, the latest decision or expression of the Louisiana Supreme Court is controlling. The latest expression of the La. Supreme Court is in connection with the *Robideaux*, *Abate* and *Marquez* cases, *supra.*

On page 26 of their brief petitioners state:

> "The Fifth Circuit Court of Appeals has previously indicated that it did not feel bound by such a doctrine in the case of Sabine Lumber Co. vs. Broderick (1937) 88 F. 2d 586, l. c. 588, where it said, in speaking of a case in which there were conflicting decisions within the state: 'Considering the conflict in the Louisiana jurisprudence, the District Court was entitled to follow the decisions he considered correctly stated the law.' "

Reference to the decision written by the late Judge Foster, a Louisiana lawyer, discloses that there were six decisions of the Louisiana Supreme Court on the question whether a tenant in possession can contest his landlord's title. All these decisions were rendered within a comparatively short period and many about the same time. However, before the case was decided by the Circuit Court of Appeals, the Louisiana Supreme Court decided the question in *Gulf Refining Co. vs. Glassell*, 186 La. 190, 171 So. 846, and the Circuit Court of Appeals followed the latest expression of the La. Suupreme Court. We quote:

> "In a well considered opinion, the Supreme Court of Louisiana comprehensively reviewing and distinguishing the previous jurisprudence, has unequivocally held that a mineral lease giving the right to develop the land and recover the underlying minerals is to be considered the same as a lease of land for agricultural use and subject to the same law. **We feel bound to follow this latest expression of the Louisiana Supreme Court and we are content to do so." (Bold face type ours.)**

That decision is in harmony with *Erie vs. Tompkins*, and other late decisions of this Court.

The petitioners state that the Circuit Court of Appeals below rendered a decision in conflict with the decision of the Tenth Circuit Court of Appeals in the case of *Ryan-Richards, Inc. vs. Whitesides*, 96 F. 2d 826. That decision is easily distinguishable on facts from the facts in the instant case.

That the naming of Ewell in the rider attached to the insurance policy sued upon was not an admission that the relationship of master-servant or principal-

agent existed at the time of the accident was demonstrated in our first supplemental brief filed in the Circuit Court of Appeals, pages 1 to 9, inclusive. We shall not repeat here the arguments urged in support of our contention, nor cite the cases relied upon. It sufficeth to state that the particular endorsement on respondent's policy was the type of endorsement required by the Louisiana Casualty & Rating Bureau on all non-ownership liability policies. The use of the forms approved by the Bureau was obligatory, not voluntary as in the *Ryan-Richards* case. However, regardless of what was stated in the insurance policy, the relationship of independent contractor could not be changed to that of master-servant or principal-agent where the facts proved that the relationship of independent contractor actually existed.

Moreover, if there is a conflict among the circuits as to questions controlled by state law, that of itself is not a reason for granting a writ of certiorari. *Ruhlin vs. New York Life Ins. Co.*, 58 S. Ct. 860, 304 U.S. 202, 82 L. Ed. 1290.

Where the undisputed facts show that the relationship of Independent Contractor exists, the District Court should direct verdict in favor of the defendant who is sued as the alleged master or alleged principal and the Appellate Court is justified in ruling that as a matter of law the respondent insurance company is not liable

In the case of *Venuto v. Robinson* (C.C.A. 3rd Cir.) 118 F. 2d 679, the defendant, who was sued for damages arising out of a collision between two automobiles and a truck operated by one Robinson, contended that there was insufficient evidence to establish that Robinson was its

servant at the time of the accident and on appeal to the Circuit Court of Appeals urged that the District Court had erred in denying its motion for a directed verdict. In upholding the defendant's contention, the Court said:

> " * * * Ordinarily, the problem of determining, upon evidentiary facts whether the relationship between two parties is that of master and servant or employer and independent contractor is one to be answered by the triers of the facts. Restatement, Agency section 220. But here, as in many other places in the law, answers to the fact questions have been crystallized through judicial determination. If facts comparable to those in this case have been crystallized into judicial rule in New Jersey, that rule governs in the federal court. Compare *Stoner v. New York Life Ins. Co.*, 1940, 61 S. Ct. 336, 85 L. Ed. ——.
>
> "The problem then becomes one of fact matching of various decisions to see whether a set of facts under consideration is covered by the adjudicated cases. Obviously, the problem is, in most instances, a matter of judgment for an exact duplication of one piece of litigation by another is never found. But an examination of New Jersey decisions convinces us that, in situations where the facts establishing the independent contractor relationship were weaker than in the instant case, the courts have held the relationship between the parties to be that of employer and independent contractor. * * * No useful purpose would be served in a detailed recital of the facts of these cases which are already set out in the reports. They convince us that upon the facts as presented here New Jersey decisions establish the relationship in this case of Robinson to Ross as that of an independent contractor. It follows, therefore, that the trial court was in error in failing to give the binding instructions on this point requested by the defendant."

As heretofore shown the facts are undisputed and clearly show that Ewell was an independent contractor and not a servant or agent of the Press, and hence as a matter of law, judgment should not and cannot be rendered against respondent, the insurer of the Press, under the doctrine of *respondeat superior*.

Conclusion

In their reasons relied upon for allowance of a writ, petitioners state on pages 12 and 13 of their petition:

> " * * * Your petitioners submit that the Circuit Court of Appeals, consisting of judges unversed and untrained in the learning and application of the Louisiana Civil Code and in the jurisprudence of Louisiana not only substituted their judgment for that of the jury but also rendered a decision contrary to the Louisiana Civil Code and to the applicable jurisprudence of Louisiana; that in so doing, they violated federal rules of law established by the decisions of this Court and of other Circuit Courts of Appeals based upon the statutes and Constitution of the United States. Petitioners request this Court to note that the three circuit court judges who decided his cause are all from states other than Louisiana. Judge Hutcheson, who wrote the opinion, came to the Circuit Court of Appeals from Texas. In the decision of the case at bar, Judge Hutcheson relied heavily upon Texas cases which do not agree with the jurisprudence of Louisiana. Judges Holmes and Sibley who concurred in the judgment are from Mississippi and Georgia, respectively.
>
> "District Judge Adrian J. Caillouet, of Louisiana, who is versed in the theory and application of the Louisiana Civil Code and in the jurisprudence of Louisiana by training and experience, held that a jury case had been made and rendered the judgment based on Louisiana jurisprudence

which was reversed by the Circuit Court of Appeals."

They infer that no judge other than a Louisiana trained judge can correctly decide this case. We do not subscribe to this reasoning. If followed to its logical conclusion, Your Honors, not being trained in the Louisiana law, are not qualified to judge the case, nor is the petitioners' brief writer, a Missouri lawyer, qualified to brief the case.

The Louisiana law on the subject of *respondeat superior* is no different from the law in the common law jurisdictions. The late Judge Foster, who was admitted to the Louisiana Bar many years ago, and who sat upon the United States District Court and later upon the United States Circuit Court of Appeals in the State of Louisiana, was as well qualified as anyone to express an opinion as to the law of Louisiana as regards the doctrine of *respondeat superior*. In 1941, he said *Robideaux vs. Hebert* correctly stated the Louisiana law on this subject (*Daroca vs. Metropolitan Life Ins. Co.*, 121 F. 2d 917). The Louisiana law has not changed since then.

Moreover, in the case of *Robideaux vs. Hebert, supra*, the Louisiana Supreme Court cited common law authorities to support its findings, namely, the case of *Casement v. Brown*, 148 U.S. 615, 13 S. Ct. 672, 37 L. Ed. 582 and *A. & E. Enc. of Law* (2d Ed.). Also in the cases so strenuously relied upon by the petitioners for the writ herein, the courts supported their decisions with statements of the law taken from *Ruling Case Law, Corpus Juris, Cooley on Torts, 2d Thompson on Negligence*, each and all of which are compilations of the common law. In the case of *Marquez v. LeBlanc, supra*, the opinion was written by Judge Higgins, now an Associate Justice on the

Louisiana Supreme Court. He relied altogether on common law decisions and authorities to find that an employer who has no right of control over the details of performance, is not responsible for the negligence of the person undertaking the performance. The cases cited in the opinion are:

McCarthy v. Souther, 83 N.H. 29, 137 A. 445; *Pyyny v. Loose-Wiles Biscuit Co.*, 253 Mass. 574, 149 N.E. 541; *Ramp v. Osborne, et al.*, 115 Or. 672, 239 Pac. 112; *Aldrich v. Tyler Grocery Co.* (1921) 206 Ala. 138, 89 So. 289, 17 A.L.R. 617; *James v. Tobin-Sutton Co.* (1923), 182 Wis. 36, 195 N.W. 848, 29 A.L.R. 457.

For these reasons and for the reasons stated in the original and supplemental briefs filed in the United States Circuit Court of Appeals for the Fifth Circuit, as well as in the respondent's opposition to the plaintiffs' petition for a rehearing, the plaintiffs' petition for certiorari should be denied.

Respectfully submitted,

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CHARLES VERNON PORTER,
L. W. BROOKS,
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JAMES R. FULLER,
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ADA MOTT,
Of Counsel for Respondent.

APPENDIX I.

No. 29,772

SUPREME COURT
OF THE
STATE OF LOUISIANA

Filed February 4th, 1929.
(Signed): Percy J. Heines
Deputy Clerk.

NICK ABATE, ET AL.
VERSUS
CHRISTOPHER HIRDES, ET AL.

In re Mr. and Mrs. Nick Abate, Applying for Certiorari, or writ of review, to the court of Appeal, Parish of Orleans, State of Louisiana.

Writ Refused. On the facts found by the Court of Appeal the judgment is correct.

(Signed): St. Paul
" C. A. O'N.
" W. O.
" H. F. B.

Woodville & Woodville,
Attorneys for Applicant.

Deutsch and Kerrigan,
Attorneys for Respondents.

A TRUE COPY,
Clerk's Office, New Orleans, April 29, 1943
LOUIS NIKLAUS,
Clerk.

(SEAL)

APPENDIX II.

No. 32,120

SUPREME COURT
OF THE
STATE OF LOUISIANA

Filed November 2nd, 1932
(Signed): Percy J. Heines
Deputy Clerk.

MRS. JENNIE MARQUEZ, WIDOW OF LOUIS FRED ZIEGLER
VERSUS
J. E. LeBLANC, ET AL.

In re J. E. LeBlanc, Applying for Certiorari, or writ of review, to the court of Appeal, Parish of Orleans, State of Louisiana.

Writ refused. The question involved is purely one of fact.

(Signed): W. O.
" C. A. O'N.
" J. R. L.
" St. Paul
" W. G. R.
" H. F. B.
" F. M. O.

Monroe & Lemann and Walter J. Suthon, Jr.,
Attorneys for Applicant.

W. H. Talbot,
Attorneys for Respondents.

A TRUE COPY,
Clerk's Office, New Orleans, April 29, 1943
LOUIS NIKLAUS,
Clerk.

(SEAL)

(12)

JUN 10 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER, 1942, TERM.

No. 938.

LYMAN FLENIKEN AND MRS. LYMAN FLENIKEN, PETITIONERS,

VS.

GREAT AMERICAN INDEMNITY COMPANY, A CORPORATION, CAPITAL CITY PRESS, A CORPORATION, WM. WOLF BAKERY, INC., A CORPORATION, AND HARRY V. BOOTH, RECEIVER OF UNITED EMPLOYERS CASUALTY COMPANY, A CORPORATION, RESPONDENTS.

PETITION FOR REHEARING OF PETITIONERS.

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Supreme Court of the United States

OCTOBER, 1942, TERM.

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PETITION FOR REHEARING OF PETITIONERS.

Come now the above named petitioners, Lyman Fleniken and Mrs. Lyman Fleniken, and present this their petition for rehearing of the petition for certiorari in this case.

I.

Jurisdiction.

The petition for certiorari was filed 16th day of April, 1943, and was denied on the 17th day of May, 1943. This

petition is filed within twenty five days thereafter under Rule 33 of this Court.

II.

Reasons for Petition for Rehearing.

On study it is found that neither the petition for certiorari nor the brief clearly points out that the Court of Appeals below was in error on the principal point involved in applying the American Law Institute's Restatement of the Law of Agency to reach a result contrary to the jurisprudence of Louisiana as exemplified by the Louisiana Revised Civil Code, Articles 2317 and 2320 and as exemplified by the applicable Louisiana decisions, namely, *Ragas* v. *Douglas*, (La. Sup., 1916) 139 La. 773, *Ravare* v. *McCormick & Co.*, (La. App., 1936) 166 So. 183, and *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351, reversed on rehearing 191 So. 713, cert. granted by La. S. Ct. (Appendix to petition page 25), cert. vacated by stipulation of compromise (Appendix to petition page 26).

The error lay in applying the American Law Institute's Restatement of the Law of Agency, Sections 2 and 250 and foreign cases and in ignoring the fact that the Louisiana jurisprudence is contrary to the conclusion arrived at on the basis of the Restatement and foreign case law cited by the Court of Appeals in support of its conclusion.

III.

The Controlling Question.

The controlling question therefore is: Did the Court below by employing the *dictum* of the Restatement of the Law of Agency and the authority of foreign jurisdictions reach a different result than would have been reached by the Courts of Louisiana applying Louisiana jurisprudence?

A subsidiary question is whether Petitioners or Respondent has correctly stated the facts. In its brief, Re-

spondent challenged certain statements of fact made by Petitioners (Respondents' Brief page 1), and set out twenty one separate statements of fact in its argument (Respondents' Brief pages 9-11). We wish to point out here that the jury found against the Respondent Great American Indemnity Company on the issues of fact which it claims to have been established in its favor. On this appeal it is elementary that the facts must be viewed in the light most favorable to your Petitioners. So viewing the facts, Respondents' statement of the case is incorrect and the exceptions to your Petitioners' statement are not well taken. The Respondent attempted to state the facts in the light most favorable to it, which is not permissible.

IV.

The Court of Appeals Erred.

On the controlling question, the affirmative holding of the Circuit Court of Appeals is in direct conflict with the applicable local jurisprudence.

1. The American Law Institute's Restatement of the Law of Agency (whether correctly interpreted by the Court below or not) does not supersede the jurisprudence of Louisiana.

2. The Court below reached a different result than would have been reached by the Courts of Louisiana applying Louisiana jurisprudence. The Court below construed Articles 2317 and 2320 of the Louisiana Revised Civil Code, directly contrary to the jurisprudence of Louisiana as exemplified in the controlling decision of *Ragas* v. *Douglas*, (1916) 139 La. 773, 72 So. 242. The Court below held that these sections contained a limitation on the responsibility of masters. The Supreme Court of Louisiana in the Ragas case held expressly that the Court "does not operate to effect" the limitation relied on by the Court below.

In denying certiorari this Court has upheld a decision of the Court below construing a provision of the Louisiana Civil Code directly contrary to the construction placed upon it by the highest Court in Louisiana.

3. If this case had been decided by the Courts of Louisiana, the judgment in favor of your Petitioners would have been affirmed. *Ravare* v. *McCormick & Co.*, (La. App., 1936) 166 So. 183; *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351, reversed on rehearing (La. App., 1939) 191 So. 713, cert. granted by Louisiana Supreme Court. These last controlling cases of Louisiana Courts were brushed aside in favor of the Restatement and foreign cases.

V.

Public Importance.

The granting of the petition for certiorari in this case is a matter of great public importance. The Circuit Court of Appeals below determined an important question of Louisiana law in a manner which conflicts with the applicable Louisiana jurisprudence contained in the Louisiana Revised Civil Code and decisions of the Louisiana courts applying the Code. The only authority to sustain the Circuit Court of Appeals is the American Law Institute's Restatement of the Law of Agency (if the Court of Appeals is correct, which we deny) and cases from foreign jurisdictions. The Respondents defended the correct construction of the Louisiana Code with a citation from the Restatement (Respondents' Brief pages 2 and 3). There will be many cases involving the doctrine of *respondeat superior* and the application of Articles 2317 and 2320 of the Louisiana Revised Civil Code tried in the federal courts of Louisiana. If the decision in the case at bar is permitted to stand and the federal courts follow that decision, as they well may, contrary results will be reached in like cases depending upon the fortuitous circumstances of federal jurisdictions. This is a grave

question and one that should not be permitted to pass in review by this Court.

Conclusion.

For the foregoing reasons, Petitioners respectfully urge that a rehearing be granted; that upon further consideration the order of May 17, 1943, denying the petition for certiorari will be revoked; and that the writ of certiorari issue.

William H. Becker

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Columbia, Missouri,
Of Counsel for Petitioners.

Certificate.

I, William H. Becker, Counsel for Petitioners herein, do hereby certify that the foregoing petition for rehearing is presented in this cause in good faith and not for delay.

William H. Becker

WILLIAM H. BECKER,
Attorney for Petitioners.